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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 537

ARTHUR C. HARVEY COMPANY, PETITIONER,

vs.

JOHN F. MALLEY AND OR MALCOLM E. NICHOLS, FORMER COLLECTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 3, 1932

CERTIORARI GRANTED JANUARY 9, 1933

(37,234)

(37,234)

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1931.

No. 2667.

ARTHUR C. HARVEY COMPANY,
PLAINTIFF, APPELLANT,
v.
JOHN F. MALLEY,
FORMER COLLECTOR OF INTERNAL REVENUE,
AND/OR
MALCOLM E. NICHOLS,
FORMER COLLECTOR OF INTERNAL REVENUE,
DEFENDANTS, APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 4319, LAW DOCKET.

ARTHUR C. HARVEY COMPANY, PLAINTIFF,
v.
JOHN F. MALLEY,
FORMER COLLECTOR OF INTERNAL REVENUE,
AND/OR
MALCOLM E. NICHOLS,
FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANTS.

WRIT.

[L. S.] MASSACHUSETTS DISTRICT, SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of our District of Massachusetts, or his Deputy, GREETING:

We command you to attach the goods or estate of John F. Malley, former Collector of Internal Revenue at Boston, and/or Malcolm E. Nichols, former Collector of Internal Revenue at Boston, of Boston, Suffolk County, in our District of Massachusetts, to the

value of one hundred and fifty thousand dollars, so that you have him or them before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of March, 1930. Then and there, in our said court, to answer unto Arthur C. Harvey Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts with a usual place of business in Boston and said Commonwealth. In an action of contract, to the damage of the said Arthur C. Harvey Company (as it says), the sum of one hundred and fifty thousand dollars ($150,000), which shall then and there be made to appear, with other due damages. And have you here this writ, with your doings therein.

Witness, the Honorable JAMES M. MORTON, Jr., at Boston, the twenty-fifth day of January in the year of our Lord one thousand nine hundred and thirty.

HELEN I. TWEEDY,
Deputy Clerk.

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss. BOSTON, February 3, 1930.

Pursuant hereunto I have this day at o'clock and minutes, M., attached a chip as the property of the within named John F. Malley and thereafter on the same day I summoned the within named John F. Malley to appear at court as within commanded by giving in hand to him at Boston in said District an original summons to this writ.

WILLIAM J. KEVILLE, *United States Marshal,*
by JOHN J. HARVEY, *Deputy.*

The writ in this cause was duly entered at the March Term of this court, A. D. 1930, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, March 26, 1930, the following Declaration was filed:

DECLARATION.

[Filed March 26, 1930.]

COUNT I.

And the plaintiff says:

1. That the plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, with a usual place of business in Boston, Allston District, Suffolk County in said Commonwealth.

2. That the defendant John F. Malley is now residing in Boston within the said Commonwealth and was, from the first day of December, 1913 to the thirtieth day of September, 1919, the duly qualified United States Collector of Internal Revenue for the District of Massachusetts.

3. That the defendant Malcolm E. Nichols is now residing in Boston within the said Commonwealth, and was from the first day of August, 1921 to the thirty-first day of August, 1925, the duly qualified United States Collector of Internal Revenue for the District of Massachusetts.

4. That this is an action of contract arising under the laws of the United States, providing for internal revenue, brought by the plaintiff against the defendants, both or either of them, as collectors of internal revenue, as aforesaid, to recover the sum of seventy-four thousand six hundred forty-eight and 39/100 dollars ($74,648.39) together with the interest thereon, wrongfully, erroneously and illegally collected from the plaintiff under the circumstances and in the manner hereinafter more particularly described.

5. That for the year 1917, and all prior years where it was required by law to do so, the plaintiff made its income tax returns, computed its taxes and paid the same upon the regular "calendar year" basis, as it was required to do under all of the income tax statutes, prior to the enactment of the Revenue Act of 1918.

6. That the Revenue Act of 1918 (40 Stat. 1057) expressly changed the basis upon which the tax was imposed upon corporations and required the net income to be computed and the return to be made, upon the basis of the "taxable year" as therein defined, to wit:

"Section 230. (a) That, in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, and by section 4 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates. . . ."

"Section 232. That in the case of a corporation subject to the tax imposed by section 230 the term 'net income' means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (b) of section 212 or in section 226."

"Section 212. (a) . . . ."

(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; . . . if the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

"Section 200. That when used in this title—

The term 'taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or section 232. The term 'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December. The first taxable year, to be called the taxable year 1918, shall be the calendar year 1918 or any fiscal year ending during the calendar year 1918; . . ."

8. That by reason of the method of accounting regularly employed by it, as aforesaid, the plaintiff was required by the foregoing provisions of the Act to make a return for the "taxable year" beginning July 1, 1917 and ending June 30, 1918, and to

compute the tax thereon in the manner provided in Section 205 (a) of the Revenue Act of 1918, to wit:

> "Section 205. (a) That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title 1 of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title 1 of the Revenue Act of 1917, which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period. . . ."

9. That the plaintiff made its return for the "taxable year 1918" for the period beginning July 1, 1917 and ending June 30, 1918, and computed the tax thereon in the manner provided by Section 205 (a) as aforesaid and the true and correct amount of tax payable on the said return for the "taxable year 1918" was and is one hundred forty-six thousand ninety-eight and no/100 dollars ($146,098).

10. That the Commissioner of Internal Revenue made an original assessment of the plaintiff's tax for the said "first taxable year" under the Revenue Act of 1918 in the amount of three hundred two thousand four hundred thirty-eight and 83/100 dollars ($302,438.83), the same being made during the year 1919, of which said sum ($302,438.83) two hundred twenty-six thousand nine hundred seventy-seven and 44/100 dollars ($226,977.44) was during the said year 1919 paid by the plaintiff to the defendant Malley, collector of internal revenue as aforesaid.

11. That on or about April 9, 1923, the plaintiff filed with the defendant Malcolm E. Nichols as he was the then duly qualified collector of internal revenue at Boston, Massachusetts, as aforesaid, a claim for refund on Treasury Department Form 843 fully setting forth therein all of the grounds therefor and alleging that the said original assessment ($302,438.83) was erroneous and ex-

cessive in the amount of one hundred fifty-six thousand three hundred ninety and no/100 dollars ($156,390) and that the sum of one hundred seven thousand eight hundred twenty-six and 61/100 dollars ($107,826.61) or such greater amount as was legal should be refunded to the plaintiff on the same grounds and for the same reasons as alleged in this action.

12. That on or about May 7, 1923 the Commissioner of Internal Revenue through his duly authorized deputy allowed the plaintiff's said claim for refund and notified the plaintiff that an examination of its income tax returns, books of account and records for the "taxable year 1918" disclosed an overassessment of the tax in the amount of one hundred fifty-six thousand three hundred forty and 83/100 dollars ($156,340.83) and thereafter issued to the plaintiff the regular so-called certificate of overassessment allowing said amount ($156,340.83).

13. That of the said overassessment ($156,340.85), as is shown by the said certificate of overassment, seventy-five thousand four hundred sixty-one and 39/100 dollars ($75,461.39) was abated leaving a net overpayment in the amount of eighty thousand eight hundred seventy-nine and 44/100 dollars ($80,879.44).

14. That of the said net overpayment ($80,879.44), two thousand four hundred sixty-seven and 06/100 dollars ($2,467.06) together with the interest thereon was on or about May 21, 1924 refunded to the plaintiff; three thousand seven hundred sixty-three and 99/100 dollars ($3,763.99) was properly credited and applied to underpayments of the plaintiff's tax for the year 1920, and seventy-four thousand six hundred forty-eight and 39/100 dollars ($74,648.39) was on or about May 15, 1924, wrongfully, erroneously and illegally credited and applied by the defendant Nichols to alleged underpayments of the plaintiff's taxes for the years 1915 to 1917, inclusive, in the respective amounts as follows:

For the year 1915	$348.74
For the year 1916	4,751.03
For the year 1917	69,548.62
Total	$74,648.39

15. That the assessment and collection of any and all income taxes for the years 1915, 1916 and 1917 was in 1924 barred by Section 250 (d) of the said Revenue Act of 1918, and the credit thereto as aforesaid of the overpayment for the year 1918 was wrongful, erroneous and illegal, and the said sum ($74,648.39) together with the interest thereon was and is rightfully refundable to the plaintiff as provided in Sections 607 and 609 of the Revenue Act of 1928, to wit:

> "Section 607. Any tax (or any interest, penalty or additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."
>
> "Section 609. (a) Any credit against a liability in respect of any taxable year shall be void if any payment in respect to such liability would be considered an overpayment under section 607."
>
> . . . . . .
>
> "(c) The provision of this section shall appiy to any credit made before or after the enactment of this act."

16. That on or about July 17, 1929, the plaintiff duly filed with the Commissioner of Internal Revenue a claim on Treasury Department Form 843 for the refund of the said sum ($74,648.39) and the interest thereon, together with a petition in support of the said claim, wherein all of the grounds both in law and in fact upon which said claim is based are set forth fully and in detail.

17. That on or about February 26, 1930, the Commissioner of Internal Revenue notified the plaintiff that the said claim had been rejected, and the said Commissioner refused and still refuses to refund to the plaintiff the said sum ($74,648.39) or any part thereof or the interest thereon, or to permit the defendants or either of them to refund said sum or any part thereof or the interest thereon to the plaintiff.

Wherefore, the plaintiff says that the defendants or either of them owes it seventy-four thousand six hundred forty-eight and 39/100 dollars ($74,648.39) together with the interest thereon at the rate of six percent per annum (6%) from the date of the said overpayment until the same shall be refunded and repaid to the plaintiff, as shown in the plaintiff's bill of particulars hereto annexed.

COUNT II.

(For the same cause of action as to the defendant Malley.)

And the plaintiff says that the defendant John F. Malley, as former collector of internal revenue, owes the plaintiff the sum of seventy-four thousand six hundred forty-eight and 39/100 dollars ($74,648.39) for money had and received by the defendant to the plaintiff's use together with interest thereon at the rate of six percent per annum (6%) until the same shall be paid, as shown in the plaintiff's bill of particulars hereto annexed.

COUNT III.

(For the same cause of action as to the defendant Nichols.)

And the plaintiff says that the defendant Malcolm E. Nichols, as former collector of internal revenue, owes the plaintiff the sum of seventy-four thousand six hundred forty-eight and 39/100 dollars ($74.648.39) for money had and received by the defendant to the plaintiff's use together with interest thereon at the rate of six percent (6%) until the same shall be paid, as shown in the plaintiff's bill of particulars hereto annexed.

O. WALKER TAYLOR,
Plaintiff's Attorney.

The defendants, by their attorneys, hereby agree that the within declaration may be filed late.

FREDERICK H. TARR,
United States Attorney,
by W. H. MARSHALL,
Assistant United States Attorney,
Attorney for Defendants.

PLAINTIFF'S BILL OF PARTICULARS.

Federal Income Tax for Taxable Year 1918.

Original Assessment in 1919—Account No. 402,091,		$302,438.83
Abated by Commissioner		75,461.39
Paid to John F. Malley, Collector, in 1919 . .		$226,977.44
Tax Liability as determined by Commissioner in 1924,		146,098.00
Overpayment for year 1918		$80,879.44

Adjustments by Nichols, Collector, in 1924.

Refunded	$2,467.06	
Properly credited to 1920 tax . .	3,763.99	6,231.05
Erroneously credited to 1915-'16-'17 taxes,		$74,648.39

This cause was thence continued from term to term to the December Term, A. D. 1930, when, to wit, January 20, 1931, the following Answers were filed within the extended time:

ANSWER OF DEFENDANT JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE.

[Filed January 20, 1931.]

Now comes the defendant John F. Malley, former collector of internal revenue, in the above entitled action and for his answer to the declaration on file herein denies each and every material allegation, item, count and particular in said declaration contained.

By his Attorney,

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

ANSWER OF DEFENDANT MALCOLM E. NICHOLS, FORMER COLLECTOR OF INTERNAL REVENUE.

[Filed January 20, 1931.]

Now comes the defendant Malcolm E. Nichols, former collector of internal revenue, in the above-entitled action and for his answer to the declaration on file herein denies each and every material allegation, item, count and particular in said declaration contained.

By his Attorney,

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

This cause was thence continued from term to term to the June Term, A. D. 1931, when, to wit, August 1, 1931, the following Motions of said Defendants that Plaintiff Elect Against which of the Defendants the Action Will Proceed were filed:

MOTION OF DEFENDANT JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE, THAT PLAINTIFF ELECT AGAINST WHICH OF THE DEFENDANTS THE ACTION WILL PROCEED.

[Filed August 1, 1931.]

Now comes the defendant John F. Malley, former collector of internal revenue, and moves that the plaintiff be ordered to elect against which of the defendants it will proceed, or whether plaintiff will proceed against the defendants jointly, for the following reasons:

1. There is a misjoinder of parties defendant in this action, in that a suit against a collector of internal revenue is a personal one and there can be no joint liability.

2. There is a misjoinder of causes of action.

3. The declaration herein alleges three separate and distinct causes of actions (a) against the defendant John F. Malley personally; (b) against the defendant Malcolm E. Nichols personally and

(c) against the defendants John F. Malley and Malcolm E. Nichols jointly.

4. The declaration as it now stands will not permit of an orderly trial in accordance with the rules of the common law and the practice of this court.

By his Attorney,

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

MOTION OF DEFENDANT MALCOLM E. NICHOLS, FORMER COLLECTOR OF INTERNAL REVENUE, THAT PLAINTIFF ELECT AGAINST WHICH OF THE DEFENDANTS THE ACTION WILL PROCEED.

[Filed August 1, 1931.]

Now comes the defendant Malcolm E. Nichols, former collector of internal revenue, and moves that the plaintiff be ordered to elect against which of the defendants it will proceed, or whether plaintiff will proceed against the defendants jointly, for the following reasons:

1. There is a misjoinder of parties defendant in this action, in that a suit against a collector of internal revenue is a personal one, and there can be no joint liability.

2. There is a misjoinder of causes of action.

3. The declaration herein alleges three separate and distinct causes of actions (a) against the defendant Malcolm E. Nichols personally, (b) against the defendant John F. Malley personally and (c) against the defendants John F. Malley and Malcolm E. Nichols jointly.

4. The declaration as it now stands will not permit of an orderly trial in accordance with the rules of the common law and the practice of this court.

By his Attorney,

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

At the same term, to wit, August 3, 1931, the following Waiver of Jury Trial and Plaintiff's Motion for Further Particulars Under Rule 41, were filed:

WAIVER OF JURY TRIAL

[Filed August 3, 1931.]

It is hereby agreed in the above-entitled action that trial by jury is waived.

O. W. TAYLOR,
Attorney for Plaintiff.

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney,
Attorney for Defendants.

PLAINTIFF'S MOTION FOR FURTHER PARTICULARS UNDER RULE 41.

[Filed August 3, 1931.]

Now comes the plaintiff and moves under Rule 41 that the defendants either or both of them in the above-entitled cause be required to file within such time and upon such terms as the court may direct a further and better statement of the nature of the defenses to be relied upon in this suit and also further and better particulars of the matter stated in the motions herein filed by each of the defendants to the effect that the plaintiff elect against which of the defendants the action will proceed and as grounds for the allowance hereof the plaintiff respectfully submits the following:

1. The action arises by reason of the fact that during the year 1919 the plaintiff paid to the defendant Malley the sum of $237,063.28 on account of its income, war profits and excess profits taxes for the fiscal period ended June 30, 1918.

2. The defendant Malley resigned from the office of Collector of Internal Revenue on or about the thirteenth day of September, 1919.

3. The defendant Malcolm E. Nichols assumed his duty as Col-

lector on or about the first day of August, 1921 and held that office until the thirty-first day of August, 1925.

4. The Commissioner of Internal Revenue did not make any examination of the plaintiff's return for the fiscal year ended June 30, 1918, until after the defendant Malley had resigned.

5. On or about May 7, 1923, the Commissioner of Internal Revenue after an examination of the plaintiff's income tax return for the fiscal year ended June 30, 1918, determined that there had been an overpayment of the plaintiff's income taxes for that year in the amount of $74,648.39.

6. On May 16, 1924, the Commissioner advised the plaintiff that certificate of overassessment No. 29852 upon which the said overpayment was determined and allowed by the Commissioner had been regularly scheduled on November 15, 1923, so that the examination of the plaintiff's return, allowance of the overpayment for the 1919 taxes and the issuance of the said certificate all took place in 1923 or 1924 during the term of office of the defendant Nichols.

7. By the said certificate of overassessment No. 29852 the said overpayment of $74,648.39 which the Commissioner of Internal Revenue had determined and allowed as aforesaid for the year 1918 was credited and applied to alleged underpayment of the plaintiff's taxes for the years 1915, 1916 and 1917 as alleged in paragraph 14 of the plaintiff's declaration.

8. From the foregoing facts it is clear that the actual payment of the taxes in dispute was made to the defendant Malley and that after the determination and allowance of the overpayment the sum in dispute would have been refunded to the plaintiff as a matter of course except for the fact that said sum was credited and applied to outlawed taxes for the years 1915, 1916 and 1917 by bookkeeping entries which were made by the defendant Nichols just as illegally, as the plaintiff contends, as if the actual payments had been made to the defendant Malley.

Brady v. *United States,* 24 Fed. (2) 205.

Wherefore the plaintiff by this motion prays that the defendants

may be required to state specifically whether it relies upon the defense (1) that the outlawed taxes were collected by the defendant Malley or (2) whether it relies upon the defense that the outlawed taxes were collected by the defendant Nichols.

O. W. TAYLOR,
Attorney for the Plaintiff.

Also at the same term, to wit, August 6, 1931, issue having been joined, this cause was set down for hearing and fully heard by the court, the Honorable James A. Lowell, District Judge, sitting, the court denying said motions of both defendants that plaintiff elect against which of the defendants the action will proceed, and was taken under advisement.

This cause was thence continued to the September Term, A. D. 1931, when, to wit, October 13, 1931, an opinion of the court was announced ordering judgment for the defendants.

This cause was thence continued to the present December Term, A. D. 1931, when, to wit, December 1, 1931, a bill of exceptions was filed by the plaintiff within the extended time.

At the same term to wit, December 7, 1931, a substitute bill of exceptions, assented to, is filed by plaintiff and allowed.

Thereupon, to wit, December 7, 1931, it is considered by the court, the Honorable James A. Lowell, District Judge, sitting, that the said Arthur C. Harvey Company, plaintiff, take nothing by its said writ, and that said John F. Malley, former Collector of Internal Revenue, and/or Malcolm E. Nichols, former Collector of Internal Revenue, defendants, recover of the said plaintiff their costs of suit taxed at $

PLAINTIFF'S SUBSTITUTE BILL OF EXCEPTIONS.

[Filed and Allowed December 7, 1931.]

STATEMENT OF THE CASE.

This is a suit brought to recover $74,648.39, together with interest, of an admitted overpayment of the plaintiff's income, excess-profits and war-profits taxes for the year 1918 which the plaintiff contends was wrongfully and illegally credited and applied to

alleged underpayment of the plaintiff's income taxes for the years 1915, 1916 and 1917 after the period of limitation for the assessment and collection of any taxes for those years had expired.

The plaintiff's taxes for the year 1918 were actually paid to the defendant Malley during the year 1919. The $74,648.39 overpayment was allowed by the Commissioner of Internal Revenue on December 20, 1923 (Defendants' Exhibit B). The overpayment was applied to the alleged underpayments for the earlier years by the defendant Nichols on January 31, 1924. The application of the overpayment as thus made by the defendant Nichols was approved by the Commissioner on February 18, 1924 (Defendants' Exhibit C).

The action was brought by writ which was duly served upon both defendants. The declaration was filed on March 26, 1930. After several extensions of time, allowed by the court, both defendants answered by way of general denial on January 20, 1931. Trial by jury was waived by written stipulations filed with the clerk. On August 1, 1931, both defendants filed motions that the plaintiff be required to elect against which of the defendants it would proceed and on August 3, 1931, the plaintiff filed a motion, under Rule 41, for further particulars as to the nature of the defense. The pleadings are incorporated in the record and made a part hereof by reference.

On August 6, 1931, the case came on for trial and was heard. At the opening of the trial the defendants orally requested a ruling on their motions that the plaintiff be required to elect which of the defendants the action would proceed against and the plaintiff requested a ruling on its motion for further particulars as to the nature of the defense under Rule 41 of the District Court. Both motions were argued by counsel for both sides. The court overruled the motions as to election and saved the defendants' exceptions thereto but made no specific ruling on the plaintiff's motion for further particulars under Rule 41.

In the course of the opening argument by counsel for the plaintiff the court questioned counsel for both sides and ruled as follows:

"The COURT. Well, you sue because these allocations for past years were made after the statute had run. That is your suit, is it not?

Mr. TAYLOR (for plaintiff). Yes, your Honor.

The COURT. What do you say to that? In other words, if the certificate of overassessment, whatever it is, is valid—I understand you to say it is not valid but if it is valid—then it was too late after that to use this extra money in paying the former deficiencies. Do you admit that?

Mr. CLARK (for defendants). Yes, your Honor.

The COURT. All right.

Mr. CLARK (for defendants). The first thing that we are confronted with—

The COURT. All right; I rule that Mr. Taylor has made a prima facie case. I will hear you."

Thereupon, pursuant to the above ruling of the court, defendants' counsel was allowed to put in the entire defense and argue before the plaintiff's side of the case had been fully stated, presented or argued.

STATEMENT OF THE EVIDENCE.

No witnesses were called by either side and no oral testimony was given throughout the trial. The evidence in the case consists (1) of seven written documents which were admitted as exhibits, without objection and (2) of the admissions and uncontradicted statements of facts which were made, in open court, by counsel for the respective parties, and which, by tacit agreement between the court and counsel for both sides, were accepted as matters of fact without further proof.

First: The evidence presented on behalf of the defendants:

1. As to the nature of the suit and the fact of the application of the allowed overpayment for the year 1918 to the alleged deficiencies for the years 1915, 1916 and 1917, the court asked and counsel for the defendants replied as follows:

"The COURT. How do they bring it against you? I do not quite see. In what year were the alleged wrongful acts done?

Mr. CLARK (for defendants). This is what I call a credit case. It is a situation in which the Commissioner found an overpayment for the year 1918, a fiscal year period, and at the same time he determined that there were deficiencies due for prior years, 1915, 1916 and 1917. . . . The result was that, instead of refunding the overpayment, only a very small portion of it was refunded and the balance was credited to take care of these additional assessments for the earlier years."

2. The documents offered in evidence by the defendants and accepted without objection were as follows:

Exhibit A,—The certificate of overassessment.

Exhibit B,—the schedule of overassessment.

Exhibit C,—the schedule of refunds and credits.

Exhibit D,—plaintiff's petition and claim for refund filed July 27, 1929.

Exhibit E,—plaintiff's claim for refund filed April 10, 1923.

Exhibit F,—Treasury Department letter dated December 17, 1929, to the plaintiff from David Burnet, deputy commissioner.

All of the foregoing documents are shown in full in the record and are incorporated herein by reference and made a part hereof as completely and effectually as though the entire contents thereof were herein set forth in full.

3. At the conclusion of the presentation of the documents, above referred to, counsel for the defendants asked, and counsel for the plaintiff replied, in regard to the question of whether or not the overpayment of the plaintiff's 1918 taxes was made voluntarily as follows:

"Mr. CLARK (for defendants). There is one other fact to which I think the plaintiff will probably agree, and that is, that these 1918 taxes which represent the overpayment here in question were paid by the plaintiff voluntarily during the year 1919 to Collector Malley. Is that correct, Mr. Taylor?

Mr. TAYLOR (for plaintiff). Yes.

Mr. CLARK (for defendants). That, your Honor, represents the case for the defendant. And, since your Honor has held that the

plaintiff has made out a prima facie case, may we venture to make some comment on the record?"

The foregoing statements, documents and admissions constitute all of the evidence presented in the case on behalf of the defendants.

Second: The evidence presented on behalf of the plaintiff:

1. As to the time when the Commissioner of Internal Revenue made his examination of the return and notified the plaintiff that the allowed overpayment for the year 1918, as shown by Defendants' Exhibit A, had been credited or "allocated" to the alleged deficiencies for the years 1915, 1916 and 1917, counsel for the plaintiff stated, without objection by the defendants, as follows:

"Mr. TAYLOR (for the plaintiff). The Commissioner did not examine either the original or the amended return until 1923 when all taxes for 1915, 1916 and 1917 were outlawed, and he discovered this overpayment based upon the proper return for the year 1918 and applied it to these outlawed taxes for the other years. . . ."

After some further comments the court asked and counsel for the plaintiff stated as follows:

"The COURT. Is there any question as to when it was told to you that the amount of overpayment had been allocated to the deficiency of some other earlier tax?

Mr. TAYLOR (for plaintiff). No, sir; your Honor we have the certificate of overassessment and the letters on that, which clearly show. We also have a letter allowing the overassessment which clearly shows that that was applied to these years 1915, 1916 and 1917, after the period of limitation, which was five years, had expired. There is no question on that."

2. By way of documentary evidence the plaintiff presented in evidence, without objection, Treasury Department letter dated May 7, 1923, addressed to the plaintiff and signed by E. W. Chatterton, Deputy Commissioner, the said letter being shown in full in the record, designated "Plaintiff's Exhibit 1", and being incorporated herein by reference and made a part hereof as completely

and effectually as though the entire contents thereof were herein set forth in full.

3. In addition to the above document the plaintiff offered in evidence a letter dated December 9, 1929, as follows:

"TREASURY DEPARTMENT
Bureau of Internal Revenue

Washington, Dec 9 1929

Office of The General Counsel
GC:R:C1 NAD

Mr. O. Walker Taylor, 11 Beacon Street, Boston, Massachusetts.

In re: Arthur C. Harvey Company, Incorporated,
Boston, Massachusetts.

Sir: Reference is made to the conference held in this office on November 26, 1929, in the above entitled case concerning the taxable period January 1 to June 30, 1918, and the agreement reached relative to the claim for refund of $74,648.39, filed with the Collector of Internal Revenue at Boston on July 27, 1929.

You are, accordingly, advised that this office has recommended the rejection of said claim for the reason that the information in the case indicates a tax liability for the period under consideration equal to or in excess of the amount paid and there is therefore no overpayment of any income, war-profits, or excess profits taxes within the purview of section 284 of the Revenue Act of 1926.

Respectfully,

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue

D"

As to the foregoing letter, counsel for both sides stated and the court ruled as follows:

"Mr. TAYLOR (for plaintiff). We next wish to offer this letter for the purpose of showing the ground upon which the Commissioner rejected the claim of July 17, 1929.

The COURT. Let me see it. [Letter handed to and perused by the court.] All right; I return it.

Mr. CLARK (for defendants). I have not seen that letter.

The COURT. I am not passing on it. I am waiting to see whether you object or not.

Mr. CLARK (for defendants). [After perusing.] Why, I must object to that letter. It is irrelevant and immaterial and is not a rejection letter. It is a mere communication from one counsel to another. It is not the official action of the Commissioner. And I may further say that the formal letter from the Commissioner acting upon this claim is already in the record.

The COURT. All right; I exclude it and save your exception."

4. As to the plaintiff's income tax returns for the years 1915, 1916 and 1917 counsel for the plaintiff stated, the court asked and counsel for the defendants agreed as follows:

"Mr. TAYLOR (for plaintiff). If the defendant will admit that this credit was applied more than five years after the returns for 1915, 1916 and 1917 were filed, then that would dispense with putting in those returns.

The COURT. It is agreed that the credit was applied more than five years. Is that it?

Mr. TAYLOR (for plaintiff). Yes, sir.

The COURT. All right?

Mr. CLARK (for defendants). Yes."

The foregoing is all of the evidence which was presented on behalf of the plaintiff, and together with that presented on behalf of the defendants, above referred to, constitutes all of the evidence in the case.

At the conclusion of the presentation of the evidence for both parties, the defendants severally made a written motion that judgment be entered for the defendants severally and against the plaintiff with costs.

At the conclusion of the argument the plaintiff submitted written requests for "Findings of Fact" and "Rulings of Law", which said requests together with the "plaintiff's notice to admit or deny

facts under Rule 48", therein referred to, are shown in the record and are incorporated herein and made a part hereof as fully and effectually as though the same were herein set forth in full.

At the time of the trial the court did not make any ruling on the defendants' motion for judgment or upon the plaintiff's requests for findings and rulings.

GROUNDS OF THE PLAINTIFF'S EXCEPTIONS.

On October 31, 1931, by a written opinion the court found, ruled for the defendants and issued the following order, to which the plaintiff duly excepted:

"In the case before the court no refund could be made to the plaintiff because no claim has ever been filed for a refund of the taxes for the years 1915, 1916 or 1917. As no refund could be made, the credit is not void.

Judgment for the defendants."

The plaintiff, being aggrieved, herein respectfully excepts:

1. To the order of the court directing judgment to be entered for the defendants.

2. To the refusal of the court to grant the plaintiff's requests for findings of fact and rulings of law.

3. To the refusal of the court to issue an order directing judgment to be entered for the plaintiff.

4. To the following rulings of law as contained in the said opinion of the court:

(1) That "the plaintiff is precluded from recovery by Sections 607 and 609 of the Revenue Act of 1928".

(2) That "the purpose of the Statute (Sections 607 and 609 of the Revenue Act of 1928) was to prevent the refund of payments collected by distraint after the period of limitations fixed by the Revenue Act of 1921 had run".

(3) That Sections 607 and 609 of the Revenue Act of 1928 were "not a remedial act in favor of taxpayers but was designed to help the taxing authorities".

(4) That "the evident intention" of Section 609 "is to put credits and refunds upon the same footing and provide that

payments on a barred deficiency whether made directly by the taxpayer or indirectly by credit shall not be disturbed unless a claim for the refund of taxes paid for that year had been made".

(5) That paragraph (a) of Section 609 "should be construed as if it read: 'any credit . . . shall be void if any payment in respect of such liability would be considered an overpayment as to which the taxpayer is entitled to a refund under Section 607'".

(6) That "no refund could be made to the plaintiff because no claim has ever been filed for a refund of the taxes for the years 1915, 1916 and 1917".

(7) That "as no refund could be made, the credit", in the instant case, "is not void".

5. To the failure of the court to rule, as a matter of law, that such portion of the allowed overpayment of the plaintiff's taxes for the year 1918 as was credited to alleged underpayments of the plaintiff's taxes for the years 1915, 1916 and 1917 was "absolutely void" and of no effect under Section 609 of the Revenue Act of 1928.

Wherefore the plaintiff now prays that its within substitute bill of exceptions may be allowed.

Respectfully submitted,

O. W. TAYLOR,
Attorney for the Plaintiff.

The foregoing substitute bill of exceptions is hereby assented to.

FREDERICK H. TARR,
United States Attorney,
HENRY C. CLARK,
Special Attorney, Bureau of Internal Revenue,
by J. DUKE SMITH,
Special Assistant to United States Attorney,
Attorneys for the Defendants.

Allowed December 7, 1931.

JAMES ARNOLD LOWELL,
District Judge.

PLAINTIFF'S EXHIBIT 1.

TREASURY DEPARTMENT

Washington May 7 1923

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to
IT : SA : SM WAJ–A2393

Arthur C. Harvey Company, Allston District 34, Boston, Massachusetts.

Sirs : An examination of your income tax returns and of your books of account and records for the years 1918–1921 inc. discloses an additional tax liability for the years 1920 aggregating $635.43, and overassessments for the years 1918 amounting to $156,340.83 shown in detail in the attached statement.

In accordance with the provisions of Section 250 (d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. No particular form of appeal is required, but if filed it must set forth specifically the exceptions upon which it is taken, shall be under oath, contain a statement that it is not for the purpose of delay, and the facts and evidence upon which you rely must be fully stated. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT : SA : SM : WAJ–A2393 and will be referred to the Income Tax Unit before transmittal to the agency designated for the hearing of such appeals.

You may, if you desire, request a conference before the Income Tax Unit in connection with the appeal, to be held within the period prior to the expiration of five days after the time prescribed for the filing of the appeal. If the Income Tax Unit is unable to concede the points raised in your appeal, it will be transmitted, together with the recommendation of the Income Tax Unit, to such agency as the Commissioner may designate for final consideration.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been

made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such apppeal has been made, no claim in abatement of the assessment will be entertained.

This assessment is in addition to all other outstanding and unpaid assessments appearing upon the Collector's lists.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

E. W. CHATTERTON, Deputy Commissioner.
By Paul F. Cain Assistant Head of Division.

STATEMENT.

IT:SA:SM WAJ–A2393

In re: Arthur C. Harvey Company, Allston District 34, Boston, Massachusetts.

Year	Additional Tax	Overassessment
1918	—	$156,340.83
1919	—	—
1920	$635.43	—
1921	—	—

Reference is made to your income and profits tax returns for the period from January 1, 1918 to June 30, 1918 and fiscal years ended June 30, 1919, 1920 and 1921.

The result of an audit of your returns for these periods, as verified by your books and accounts, is shown in detail as follows:

Net income—fiscal year ended June 30, 1918.

Net income as reported on amended return		$465,015.60
Add:		
Capital expenditures	$12,792.02	
Labor disallowed	13,775.03	
Donations	1,130.00	
Taxes	1,222.18	
Additional liberty bond interest	871.23	
Bad debts recovered but not used in reflecting book income	832.83	30,623.29
		$495,638.89

Deductions:		
Additional depreciation	$148.49	
Deductions from purchases	100.00	248.49
Net income as corrected		$495,390.40

Invested Capital.

Surplus as at June 30, 1917 as shown on Agent's report	$1,164,081.00
Add: Reduction in 1915 and 1916 tax liability	212.41
Corrected surplus	$1,164,293.41
Capital stock	300,000.00
Capital stock and surplus at the beginning of year	$1,464,293.41

Changes during the Year.

Dividends:			
7/1/17	$5,250.00 365 days	$5,250.00	
7/25/17	5,000.00 341 days	4,671.23	
8/25/18	5,000.00 310 days	4,246.58	
Income tax:			
6/15/18	$340,141.51 16 days	14,910.31	
Total changes during the year			$29,078.12
Capital stock and surplus at the beginning of year			$1,464,293.41
Less: Total changes during the year			29,078.12
			$1,435,215.29
Deduction on account of inadmissibles, .006644			9,535.56
Invested capital, taxable year			$1,425,579.73
Average pre-war capital			200,867.60
Increase			$1,224.812.13

Excess profits and war profits credit.

8% of Invested Capital	$114,054.38
Exemption	3,000.38
Total tax profits credit	$117,054.38

Average pre-war income	$38,607.57
Plus 10% of increase	122,481.21
Exemption	3,000.00
Total war profits credit	$164,088.78

Computation of Taxes.

Not over	Income	Deduction	Balance	Rate	Tax.
20%	$285,135.95	$117,054.38	$168,081.57	30%	$50,424.47
Over 20%	210,254.45		210,254.45	65%	136,665.39
	$495,390.40	$117,054.38	$378,336.02		$187,089.86

War Profits Tax

Net income	$495,390.40		
Less: Credit	164,088.78		
Balance taxable at 80%	$321,301.62	$265,041.30	
Less: Excess profits tax		187,089.86	77,951.44
Total excess profits and war profits taxes			$265,041.30

Computation of Total Tax.

Excess profits and war profits taxes			$265,041.30
Net income as corrected		$495,390.40	
Less:			
Interest on U. S. obligations	$2,060.00		
Profits tax	265,041.30		
Exemption	2,000.00	269,101.30	
Taxable at 12%		$226,289.10	27,154.69
			$292,195.99
One-half, for six months period			$146,098.00
Previously assessed:			
(Original assessment, Account #402091)			$302,438.83
Tax liability			146,098.00
Indicating an overassessment of			$156,340.83

Fiscal Year Ended June 30, 1919.

The audit of the Agent's report for the periods from July 1, 1918 to June 30, 1919, results in a net loss, therefore there is no tax due.

Fiscal year ended June 30, 1920.

Net income as returned		$438,443.20
Add:		
Error in reconciliation	$ .02.	
Expenses	435.00.	
Depreciation disallowed	2,435.23.	
Loss disallowed	409.60.	3,279.85
Net income as corrected		$441,723.05

Invested Capital.

Surplus, June 30, 1919, as shown on the Agent's report		$976,080.35
Add:		
Reduction in tax liability 1915 and 1916	$212.41	
1917	18,685.87	
Fiscal year ended June 30, 1918 (1/2)	18.32	18,916.60
Corrected surplus		$994,996.95
Capital stock		300,000.00
Capital stock and surplus at beginning of the year		$1,294,996.95

Changes during the Year.

Dividends: 7/1/19	$5,250.00 366 days	$5,250.00	
Income tax:			
1918, 7/1/19	$73,049.00 366 days	73,049.00	
		$78,299.00	78,299.00
			$1,216,697.95
Less: Deduction for inadmissibles	.00733		8,918.40
Invested capital as corrected			$1,207,779.55

Excess Profits Credit.

8% of invested capital	$96,622.36
Specific exemption	3,000.00
Total	$99,622.36

Computation of Tax.

Not over	Income	Deduction	Balance	Rate	Tax
20%	$241,555.91	$99,622.36	$141,933.55	20%	$28,386.71
20%	200,167.14		200,167.14	40%	80,066.86
Totals	$441,723.05	$99,622.36	$342,100.69		$108,453.57

Income Tax.

Net income		$441,723.05	
Less:			
United States Interest	$388.49		
Excess profits tax	108,453.57		
Exemption	2,000.00	110.842.06	
Taxable at 10%		$330,880.99	33,088.10
Total tax liability			$141,541.67
Previously assessed:			
Original, Account #427011			140,906.24
Indicating an additional assessment of			$635.43

Fiscal year ended June 30, 1931.

Inasmuch as the operations for this period result in a net loss there is no tax due.

DEFENDANTS' EXHIBIT A.

United States of America Treasury Department
Washington, May 13, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of Certificate of Overassessment, allowing $156,340.83 for the period from January 1 to June 30, 1918, *in re:* Arthur C. Harvey Company, Boston, Massachusetts, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFELD,
City Clerk, Treasury Department.

[SEAL]

Mc W Bamr E. H. FFF CMC.

TREASURY DEPARTMENT

WASHINGTON 1211

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

INCOME TAX UNIT

IT:SA:SK
WAJ-A2595

CERTIFICATE OF
OVERASSESSMENT

Number: 29852

Allowed: $ 156,340.83

Rejected: $

Arthur C. Harvey Company,
Allston District 34,
Boston, Mass.

Sirs:

An audit of the return for period from Jan. 1 to June 30, 1918, Form 1120 of the above-named taxpayer indicates that the amount of tax assessed for this year was in excess of the amount due:

Tax assessed, Original	#402091	$502,438.83
Tax liability		146,098.00
Overassessment indicated		$156,340.83

The manner of arriving at this overassessment is being conveyed to you in a separate communication.

Office Record, Income Tax Unit:

The amount of the overassessment shown on this certificate is to be scheduled and forwarded to the Collector of Internal Revenue for the appropriate district, to be applied as abatement, credit, or refund as the condition of the taxpayer's account may warrant.

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit, from ~~the date~~ six months after the date of filing to the date of allowance of the claim, but on the balance as credit when required prior to the filing of the claim.

RECORD OF AUDIT AND REVIEW.

(Signature) Date

Return audited: Wm Harvey 4-29-23

Reviewed (Unit): Allan H. Watson JUN 23 1923

REVIEWED: Saw Adams 5/1/23
REVIEW SECTION.

Approved: A. Alexander
HEAD OF DIVISION.

Approved: Logan Marshall 12/29/23

COMMITTEE.

(TTT6-C) Revised April, 1922

rgh-1

Schedule Number: 7778
District: 6194.99
Boston Mass

ACTION	INITIALS	DATE
Return Stamped	SWPIF	5-23
Schedule Checked		

#74648.35 credited to unpaid taxes. To be required per Rec 609 Oct 1919 Memo to A + C 9/15/19 RF.

This action cancelled by G.C. Rec memo RF 2/24/20 dated 1/9/19. Refund not allowed.

RECORD OF ASSESSMENTS AND PAYMENTS

(Entries to be made by the Collector according to instructions.)

	Character of assessment and period covered.	List.	Year.	Month.	Account No. on Page.	Account No. on Line.	Amount assessed.	Payments. Date paid.	Payments. Amount paid.
ORIGINAL ASSESSMENT	1918	Annual	1919		4020	91	302524 67	3-19-19	60 000.00
								7-1-19	9,466.78
								9/17/19	72596.50
							Alt. on this Sch.	#7978	75 461.39
ADDITIONAL ASSESSMENT									

Tax { was / was not } paid under "specific" (written) protest.
If so paid, Collector should attach such protest to this certificate.

The records of this office are as given above.

Date certified Collector's Office

Collector of Internal Revenue.

Stamp here.

$ 48563.39 $ 3102.49 By

Deputy Collector.

Claim Filed Date: 10/16/20

CALCULATION OF INTEREST ALLOWANCE

(Entries not to be made by the Collector.)

Dates:	Year.	Month.	Day.	Year.	Month.	Day.	Year.	Month.	Day.	Year.	Month.	Day.
1. Allowance, refund or credit	23	3	30	23	12	20						
2. Payment of tax												
3. Six months from filing claim	21	4	16	21	4	16						
4. Period: Interest allowance	1	11	14	2	8	4						
5. Amount of refund												
6. Amount of credit												
7. Interest allowance	5696	55		498	44							
8. Totals (including interest)												
A	5696	55										
	498	44										
TOTAL REFUNDABLE	6194	99										

Date of computation 2-9-24

MAS

Computer.

(Stamp here.)

D—116660

f2

United States of America
General Accounting Office

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered B-1 and B-2, are true copies of the official documents now on file in the General Accounting Office in the following case: Arthur C. Harvey Company.

In witness whereof, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 19th day of November, in the year 1930, at Washington.

J. R. M. CAIN,
[SEAL] Comptroller General of the United States.

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
FORM 7805
Form approved by Comptroller General
Feb. 9, 1923

This schedule must be executed and all required steps taken without delay.
COMMISSIONER OF INTERNAL REVENUE.

SCHEDULE OF OVERASSESSMENTS AND ALLOWANCE OF ABATEMENTS, CREDITS, REFUNDS, AND RELATED CLAIMS, IF ANY

C-11891

C-11891

INCOME TAX UNIT

C-11891 District

AUTHORIZATION OF COMMISSIONER

$90987.15

MASSACHUSETTS

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The returns of the taxpayers listed herein, together with their claims (if any) and appropriate supporting evidence, have been carefully examined and the tax liability of the respective taxpayers has been determined in accordance with the available facts and the law. The overassessments or reductions in tax liability appearing in column 4 are accordingly recommended for allowance.

Date DEC 20 1923

Deputy Commissioner.

To the Collector ..... *District of* MASSACHUSETTS

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificates of Overassessment" or "Notices of Adjustment of Refund" attached thereto.

You will immediately check such items against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated, in whole or in part, and make such abatements as may be warranted by the condition of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7805-A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7805-A) referred to above, and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7805-A, and return the necessary copies of each to the Commissioner of Internal Revenue.

Date DEC 20 1923

Commissioner of Internal Revenue.

CERTIFICATE OF COLLEC

To the Commissioner of Internal Reve

The items in this schedule have been the accounts of the respective taxpayers the amounts indicated have been applied and credits on their accounts.

The amounts of overpayment and refundable have been determined to be

Date January 31, 192

Collector ..... District of

(Entries to be made by the Collector)

Item No. (1)	Certificate of Overassessment or Claim Number (2)	Name and Address of Taxpayer (3)	Overassessments or Reductions of Tax Liability (Amount) (4)	List, Page and Line, or Account Number (5)	Taxable Year (6)	Abatement (Amount) (7)	Overpayment (Amount) (8)	Credit (Amount carried to Form 7805-A) (9)	Account Credited: List, Page, and Line (10)	Due Date of Items Against Which Credit Was Made (11)	Refund (12)
32	29852	Harvey Co., Arthur C.	156,340 83	1/1 to 6/30/18		75461 39	80879 44	see distribution of overpayment on page			
								26085 00	Feb.(19 P12812	6-6-19	
32	29852	Harvey Co., Arthur C.						3128 56	Oct.'20 #427011	9-15-20	
								348 74	Mar.'23 P15811	3-30-23	
								4751 03	" " 158 6	"	
								43463 62	" " 158 2	"	
								636 43	Dec.'23 P4413	12820-23	

TREASURY DEPARTMENT
U. S. INTERNAL REVENUE SERVICE
FORM 7805-A
Form approved by Comptroller General
Feb. 6, 1923

IMMEDIATE
This schedule must be executed and all required steps taken without delay.
COMMISSIONER OF INTERNAL REVENUE.

C-22864-B-18

SCHEDULE OF REFUNDS AND CREDITS

ILLEGAL OR ERRONEOUS COLLECTIONS

INCOME TAX UNIT

ORIGINAL
Voucher to General Accounting Office

C-22864-B

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items hereon are related as they appeared for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named discloses such items to be the portions of such previously allowed overassessments or reductions of tax liability subject to refund or credit.

Date January 31, 1924.

Collector, ... District of Massachusetts.

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due

Date FEB 18 1924

Deputy Commissioner.

AUTHORIZATION OF COMMISSIONER

To the Disbursing Clerk, Treasury Department:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made of the amounts shown in column 7.

Date FEB 18 1924

Commissioner of Internal Revenue.

Item No. (1)	Certificate of Overassessment or Claim Number (2)	Name and Address of Taxpayer (3)	Net Amount Refundable (4)	Amount Credited (5)	(Not to be used by Collector) Interest Accrued (6)	Total Refundable (7)	Date of Prior Payment of Tax Collected Under Protest or Duress (8)	(Not to be used by Collector) Refunding Taxes Illegally Collected 1924 and Prior Years (9)	——— (10)	19..... (11)
B-2 32	29852	Harvey Co., Arthur C.	2467 06	78412 88	6194 [illegible]	662 05	9-17-19	8662 05		

required steps taken without delay.
COMMISSIONER OF INTERNAL REVENUE.

-11891

AND

ALLOWANCE OF ABATEMENTS, CREDITS, REFUNDS, AND RELATED CLAIMS, IF ANY C-11891

Sheet 1 of 3 sheets

INCOME TAX UNIT

District of MASSACHUSETTS

AUTHORIZATION OF COMMISSIONER

+90987.15

To the Collector ..... District of MASSACHUSETTS

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificates of Overassessment" or "Notices of Adjustment of Refund" attached thereto.

You will immediately check such items against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated, in whole or in part, and make such abatements as may be warranted by the condition of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7885-A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7885-A) referred to above, and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7885-A, and return the necessary copies of each to the Commissioner of Internal Revenue.

Date DEC 20 1923

[signature] Commissioner of Internal Revenue.

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items in this schedule have been checked against the accounts of the respective taxpayers concerned and the amounts indicated have been applied as abatements and credits on their accounts.

The amounts of overpayment and the net amounts refundable have been determined to be as indicated herein.

Date January 31, 1924.

[signature] Collector ..... District of Mass.

ACCOUNTS UNIT

Stated and entered

INITIALS	DATE
T	2/27/24

(Entries to be made by the Collector)

368m cases

ADDRESS OF TAXPAYER (3)	OVERASSESSMENTS OR REDUCTIONS OF TAX LIABILITY (AMOUNT) (4)	LIST, PAGE AND LINE, OR ACCOUNT NUMBER (5)	TAXABLE YEAR (6)	ABATEMENT (AMOUNT) (7)	OVERPAYMENT (AMOUNT) (9)	CREDIT (AMOUNT CARRIED TO FORM 7885-A) (8)	ACCOUNT CREDITED; LIST, PAGE, AND LINE (10)	DUE DATE OF ITEMS AGAINST WHICH CREDIT WAS MADE (11)	NET AMOUNT REFUNDABLE CARRIED TO FORM 7885-A (12)	REMARKS (13)
Arthur C.	156,340 83	1/1 to 6/30/18		75461 39	80879 44	see distribution of overpayment on page 43.				368-M Items.
						26085 00	Feb.'19 P128L2	6-6-19		
rthur C.						3128 56	Oct.'20 #427011	9-15-20	2467 06	
						348 74	Mar.'23 P158L1	3-30-23		
						4751 03	" " 158 9	"		
						43463 62	" " 158 2	"		
						635 43	Dec.'23 P44L3	12820-23		

IMMEDIATE

This schedule must be executed and all required steps taken without delay.

COMMISSIONER OF INTERNAL REVENUE.

64-B-16 14 S

ATE OF COLLECTOR

refund or credit on an original schedule (bearing the same number) ve been approved and allowed by the Commissioner of Internal Revenue. ers named disclosed such items to be the portions of such previously bject to refund or credit.

[signature] Collector, ... District of Massachusetts.

SCHEDULE OF REFUNDS AND CREDITS

ILLEGAL OR ERRONEOUS COLLECTIONS

INCOME TAX UNIT

ORIGINAL

Voucher to General Accounting Office

C-22864-B-16

Schedule No. IT-R 7728

Sheet 1 of 2 Sheets.

Dist. of Massachusetts

D. C. Voucher No. 1332

UNIT	NOTATIONS	DATE
Ast'd	M	2/29/24

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due

Date FEB 18 1924

[signature] Deputy Commissioner.

AUTHORIZATION OF COMMISSIONER

To the Disbursing Clerk, Treasury Department:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made of the amounts shown in column 7.

Date FEB 16 1924

[signature] Commissioner of Internal Revenue.

NO. ADDRESS OF TAXPAYER (3)	NET AMOUNT REFUNDABLE (4)	AMOUNT CREDITED (5)	(Not to be filled in by Collector) INTEREST ACCRUED (6)	TOTAL REFUNDABLE (7)	DATE OF FINAL PAYMENT OF TAXES CREDITED OR OF ASSESSMENT OF TAXES REFUNDED (8)	(Not to be filled in by Collector) REFUNDING TAXES ILLEGALLY COLLECTED 1924 and Prior Years (9)	19.... (10)	19.... (11)	PAID BY DISBURSING CLERK, TREAS. DEPT., BY CHECKS DATED APR 12 1924 NUMBERED AS FOLLOWS (12)	REMARKS (13)
Arthur C.	2467 06	78412 88	6194 9	662 05	9-17-19	8662 05			414117	

DEFENDANTS' EXHIBIT D.

United States of America Treasury Department

Washington July 31, 1931.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed are true copies of Claim for Refund of $74,648.39 with interest, income tax for 1918, (with petition attached), filed by Arthur C. Harvey Company, Incorporated, Boston, Massachusetts; Copy of letter dated December 17, 1929, to Arthur C. Harvey Company, Incorporated, Boston, Massachusetts, from David Burnet, Deputy Commissioner the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above given.

By direction of the Secretary

F. A. BIRGFELD,

[SEAL] Chief Clerk, Treasury Department.

H. C. C. EF W W Bamr RES CMC MM

(Execute Separate Form for Each Tax Period)

CLAIM FOR REFUND OF TAXES ILLEGALLY COLLECTED

State of Massachusetts 1211 129730

County of Suffolk ss:

(Name of taxpayer or purchaser of stamps.) Arthur C. Harvey Company, Incorporated.

(Residence—give street and number as well as city or town and State.) Allston District No. 34.

(Business address.) Boston, Massachusetts

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From Jan. 1	1918
To Dec. 31	1918

1. Business in which engaged Steel
2. Character of assessment or tax Income
3. Amount of assessment or stamps purchased Overpayment allowed for year 1918 $80,879.44
6. Amount to be refunded (or such greater amount as is legally refundable) with interest $74,648.39
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) November 15, 1923.
8. District in which return (if any) was filed Massachusetts—Schedule No. 7778

Deponent verily believes that this application should be allowed for the following reasons:

First: By Certificate of Overassessment No. 29852, listed on District of Massachusetts Schedule No. 7778, November 15, 1923, the Company was allowed an overassessment for 1918 in the amount of $156,340.83 of which $75,461.39 was abated making the net overpayment allowed $80,879.44, of which the amount herein claimed ($74,648.39) was erroneously credited to underassessments for the years 1915, 1916, and 1917, the assessment and collection of which was barred by Section 250 (d) of the Revenue Act of 1921. See Peerless Paper Box Co. *v.* Routzahn, 22 Fed. (2nd) 459; and Sections 607 and 609 of the Revenue Act of 1928.

Second: A petition is also filed herewith wherein the facts, authorities and the grounds upon which this claim should be allowed are more fully set forth.

ARTHUR C. HARVEY COMPANY, INC.

[SEAL] By: Edward T. Edwards Treasurer.

Sworn to and subscribed before me this 17th day of July, 1929.

Edwin C. Burbank

]SEAL] Notary Public

[Stamped:]

Received Jul 24 1929 Claims Control Section
Received Boston Mass Jul 27 1929 Claim Div. Int. Revenue
2109672 Jul 24 1929

Certificates

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered. Corp Inc. 1918 List. Reg Year. 1919 Month. Led 40

Page. 402 Line. 091. T W WHITE

Collector of Internal Revenue.

Amount rejected $74,648.39

[Stamped:]

Rejected 16096 I. T. Schedule

IT:SA:SM WAJA-2393

Arthur C. Harvey Company, Inc. Allston District #34, Boston, Massachusetts.

In re: Overpayment of taxes for 1918 erroneously credited to outlawed underpayments.

PETITION WITH SUPPORTING FACTS, LAW AND AUTHORITIES.

To the Commissioner of Internal Revenue, Washington, D. C.

Sirs:—The above named Arthur C. Harvey Company, of Boston, Massachusetts, hereby respectfully petitions for, claims or demands, the payment or refund of $74,648.39 together with the interest thereon, representing that portion of the overpayment of its tax allowed for the year 1918 which was erroneously and illegally credited to underpayments for the years 1915, 1916, and 1917, and in support of its petition respectfully submits the following:

The Facts.

By Certificate of Overassessment No. 29,852, listed November 15, 1923, Schedule No. 7778, the Company was allowed an overassessment for the year 1918 in the amount of $156,340.83 of which $75,461.39 was abated making the net overpayment allowed $80,879.44. Of this overpayment $2,467.06 was refunded; $3,763.99 was properly credited to underassessments for the year 1920, and $74,648.39 was erroneously credited to underpayments for prior years as follows:

To additional assessment for year	1915—	$348.74
" " " " "	1916—	4,751.03
" " " " "	1917—	69,548.62
Total		$74,648.39

Law Authorities and Comments.

The petitioner contends that at the time the foregoing credits were made, the collection of taxes for the years 1915, 1916, and 1917 was entirely barred by the statute of limitations, whether such collection was made by actual payment, by credit or otherwise.

First: The Revenue Act of 1921, Section 250 (d) which is pertinent to this case provides as follows:

> "The amount of income, excess profits or war profits taxes due under any return made under this act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess profits or war profits tax acts . . . shall be determined and assessed within five years after the return was filed, unless the Commissioner and the tax-payer consent in writing to a later determination, assessment and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under income, excess profits or war profits tax acts shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act; . . .."

In the case of Bowers Collector, *vs.* New York & Albany Lighterage Company, 273 U. S. 346, the Supreme Court interpreted this section of the Act to mean that both assessment and collection must be made within five years, and that if either the assessment or the collection was made beyond that limitation, there was error. See also Seaman *vs.* Bowers, 297 Fed. 371.

Second: The same principle of law holds where the Commissioner through the Collector of Internal Revenue, applies or credits an allowed overpayment for one year to a deficiency or underpayment for a prior year the assessment or collection of which is barred. In Peerless Paper Box Company *vs.* Routzahn, 22 Fed. (2) 459, the Court said:

> "My opinion is that the statute had run against the collection of the second additional tax assessment for 1917, and that the action of the Collector in October, 1924, crediting the refund for 1918 against the second additional assessment for 1917 was tantamount to the method of tax collection held by the Supreme Court to be prohibited after the expiration of the time limited by statute. Bowers *vs.* New York & Albany Lighterage Co., 273 U. S. 346, 47 S. Ct. 389; Toxaway Mills *vs.* United States, 273 U. S. 781, 4 S. Ct. 471."

Also in the cases of Brady *vs.* United States and Lyman *vs.* Sam, 24 Fed. (2) 205, both of which were tried at the same time, November 15, 1927, and are reported together, the Court said:

> "In the Brady Case a refund owed to a taxpayer was not paid to him, but was credited against an uncollected tax outlawed by the statute of limitations then in force.
>
> In the Lyman Case collection of an outlawed tax was enforced by process of distraint.
>
> Both of them are governed by Bowers *v.* N. Y. & Albany Co., 273 U. S. 346, 47 S. Ct. 389, 71 L. Ed. 676, recently decided by the Supreme Court of the United States.
>
> The Brady tax was 'collected' by the bookkeeping entry just as illegally as if there had been a suit or a process of distraint. Peerless Box Co. *v.* Routzahn, 22 F. (2d) 459."

Third: The principles of law promulgated in the cases cited above were clearly and expressly embodied in the Revenue Act of 1928, which provides as follows

> "Section 607. Any tax (or any interest, penalty or additional amount, or addition to such tax) assessed or paid

(whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Section 609. (a) Any credit against a liability in respect of any taxable year shall be void if any payment in respect to such liability would be considered an overpayment under section 607."

"(c) The provision of this section shall apply to any credit made before or after the enactment of this act."

In G. C. M. 4879 the general counsel of the Bureau of Internal Revenue interpreted the foregoing provisions of the Act of 1928 to mean that any credit applied to an outlawed tax is void and that any amount so applied shall be refunded or paid to the taxpayer as an overpayment of the tax for the taxable year with respect to which such overpayment was allowed.

Conclusion.

From the foregoing and from the records in this case it can clearly be seen that the Bureau erred in applying the overpayment for the year 1919 to the underpayment for the years 1915, 1916, and 1917 and it is respectfully submitted that the amount herein petitioned for ($74,648.39) should be paid or refunded to the petitioner. A claim for refund for the same amount on Form 843 is filed and submitted herewith.

Respectfully submitted,

ARTHUR C. HARVEY CO., INC.

[SEAL] By: Edward T. Edwards, Treasurer.

Commonwealth of Massachusetts.

Suffolk, ss.

Sworn to and subscribed before me this nineteenth day of July 1929. Edward C. Burbank

Notary Public.

My commission expires Dec. 13, 1932

IT:AR:F FBR

Arthur C. Harvey Company, Incorporated, Allston District #34, Boston, Massachusetts.

Sirs: Your claim for refund of $74,648.39 representing income and profits taxes for the year 1918, alleged to have been erroneously credited against the tax liability for the years 1915, 1916 and 1917, has been examined and will be rejected for the following reasons:

The amount you now seek to recover is a portion of an overassessment of $156,340.83 allowed for the six months' period ended June 30, 1918 on a schedule signed by the Commissioner December 20, 1923 and the amount $74,648.39 thereof was applied against the tax liability for the years 1915, 1916 and 1917. Your contention is that the credit was made after the expiration of the statutory collection period. You are advised that the records of this office indicate that your return for the period ended June 30, 1918 disclosed a tax liability of $302,524.67. Prior to 1918 the returns were filed on the calendar year basis. The corporation keep its books on a fiscal year basis ended June 30. The return for the six months' period above-mentioned apparently was filed to adjust the filing basis to a fiscal year and the tax was assessed on that basis. In the computation producing the overassessment of $156,340.83 the tax liability was computed upon the basis of the net income for the entire year taking 6/12 thereof as representing the tax for the six months' period ended June 30, 1918.

The proper method for computing the income for the six months' period in question is in accordance with the original return which you filed (Appeal of Henry D. Weed, 2 B. T. A. 84 and appeal of Coghlen Electric Company, 3 B. T. A. 1071 and Section 226 of the Revenue Act of 1918).

In a conference in the General Counsels' office you stated that you did not wish to furnish any further information to substantiate the contention that the income reported on the term filed was erroneous, therefore your return will be accepted as filed.

[Stamped:]
Rejected 16096 I. T. Schedule.
Dec 17 1929
Received Dec 17 1929 Claims Control Section

It is accordingly held that the overassessment was erroneously allowed and, therefore, that portion of the overassessment which has not yet been refunded, having been credited against the tax liability for prior years, will not be refunded at this time. Your claim will be rejected in full. The rejection will officially appear on the next schedule to be approved by the Commissioner.

Respectfully,

DAVID BURNET Deputy Commissioner.
By H. B. Robinson Head of Division.

DEFENDANTS' EXHIBIT E.

United States of America Treasury Department
Washington May 13, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of $107,826.61 and Credit of $43,463.62 to be applied against an unpaid assessment of $43,463.62 for 1917. Income and War Profits Tax for the six months period ending June 30, 1918, (with statement attached), filed by Arthur C. Harvey Company, Boston, Massachusetts, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFELD,
Chief Clerk, Treasury Department.

[SEAL]

MC W W Bamr EH FFT CMC

Dept. Letter 2–2–23 Add'l 1917 List March 15 8-2

Claim for Credit Against Outstanding Assessments
Refund of Taxes Illegally Collected

State of Massachusetts

County of Suffolk ss:

(Name of taxpayer or purchaser of stamps.) Arthur C. Harvey Company

(Business address.) Allston District #34 Boston, Mass.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From Jan. 1	1918
To June 30	1918

1. Business in which engaged Iron & Steel
2. Character of assessment or tax Income, War profits
3. Amount of assessment or stamps purchased $302,524.67
4. Reduction of Tax Liability requested (Income and Profits Tax) 43,463.62
6. Amount to be refunded (or such greater amount as is legally refundable) $107,826.61
8. District in which return (if any) was filed 3rd Mass.
9. District in which unpaid assessment appears 3rd Mass.
10. Amount of overpayment claimed as credit . $43,463.62
11. Unpaid assessment against which credit is asked, period from Jan. 1, 1917 to Dec. 31, 1917 . $43,463.62

ARTHUR C. HARVEY Co.
CHARLES W. HENDERSON Jr. Vice President.

Sworn to and subscribed before me this 9th day of April, 1923

Thomas M. Elcock

Notary Public.

[Stamped:]

Recorded May 2 1923 Claims Control Section
Received Claim Dept Apr. 10 1923 3rd District Mass.

Certificates

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered. Corp Inc. 6-30-18
Year. 1919 #402091

MALCOLM E. NICHOLS

Collector of Internal Revenue.

[Stamped:]

Adjusted under certificate of overassessment No. 29852 SASM Section June 23/23 Allen H Watson

This combination claim of credit and refund is filed as result of an examination by the Revenue Agent and subsequent adjustments by the Bureau at Washington.

The Bureau at Washington finally determined that there was additional tax due as follows:

Calendar Year 1915	$348.74	
Calendar Year 1916	4,751.03	
Calendar Year 1917	43,463.62	$48,563.39

The Agent's report and Treasury Department letter dated August 16, 1922 also indicated that there was an over-assessment for the period ended June 30, 1918 of $156,390.00. Separate claims for credit are now being filed to cover the 1915 and 1916 additional tax. The amount of credit asked in this claim covers the additional tax for 1917. The amount of the refund requested in this claim $107,826.61 is determined as follows:

Tax Assessed for period ended June 30, 1918		$302,524.67
Tax per Agent's Report		146,134.67
Overassessment per Agent's Report and Department Letter August 16, 1922		156,390.00
Claims for credit now being filed:		
1915	$348.74	
1916	4,751.03	
1917	43,463.62	
	48,563.39	48,563.39
Claim for Refund		107,826.61

There has previously been filed certain claims for abatement in reference to the tax for the period ended June 30, 1918, and we believe that in final settlement these claims for abatement would be offset against this claim for refund.

DEFENDANTS' EXHIBIT F.

TREASURY DEPARTMENT

Office of Commissioner of Internal Revenue

Washington Dec 17 1929

Address reply to Commissioner of Internal Revenue and refer to
IT:AR:F FBR

Arthur C. Harvey Company, Incorporated, Allston District # 34, Boston, Massachusetts.

Sirs: Your claim for refund of $74,648.39 representing income and profits taxes for the year 1918, alleged to have been erroneously credited against the tax liability for the years 1915, 1916 and 1917, has been examined and will be rejected for the following reasons:

The amount you now seek to recover is a portion of an overassessment of $156,340.83 allowed for the six months' period ended June 30, 1918 on a schedule signed by the Commissioner December 20, 1923 and the amount $74,648.39 thereof was applied

against the tax liability for the years 1915, 1916 and 1917. Your contention is that the credit was made after the expiration of the statutory collection period. You are advised that the records of this office indicate that your return for the period ended June 30, 1918 disclosed a tax liability of $302,524.67. Prior to 1918 the returns were filed on the calendar year basis. The corporation keeps its books on a fiscal year basis ended June 30. The return for the six months' period above-mentioned apparently was filed to adjust the filing basis to a fiscal year and the tax was assessed on that basis. In the computation producing the overassessment of $156,340.83 the tax liability was computed under the basis of the net income for the entire year taking 6/12 thereof as representing the tax for the six months' period ended June 30, 1918.

The proper method for computing the income for the six months' period in question is in accordance with the original return which you filed (Appeal of Henry D. Weed, 2 B. T. A. 84 and appeal of Coghlen Electric Company, 3 B. T. A. 1071 and Section 226 of the Revenue Act of 1918).

In a conference in the General Counsels' office you stated that you did not wish to furnish any further information to substantiate the contention that the income reported on the term filed was erroneous, therefore, your return will be accepted as filed.

It is accordingly held that the overassessment was erroneously allowed and, therefore, that portion of the overassessment which has not yet been refunded, having been credited against the tax liability for prior years, will not be refunded at this time. Your claim will be rejected in full. The rejection will officially appear on the next schedule to be approved by the Commissioner.

Respectfully,

DAVID BURNET, Deputy Commissioner.

By H. B. Robinson Head of Division.

PLAINTIFF'S REQUEST FOR FINDINGS AND RULINGS.

The plaintiff respectfully requests the Honorable Court to find as matters of fact and rule as matters of law in the above-entitled case as follows:

FINDINGS OF FACT.

1. The plaintiff respectfully requests that the court finds as matters of fact for the purposes of this suit all and each of the several facts contained in the plaintiff's notice to admit or deny facts under Rule 48 and in addition thereto the following specific facts:

2. That at the time $348.74 of the overpayment of the plaintiff's 1918 taxes was applied to an alleged underpayment for the year 1915 more than five years had expired after the filing of the plaintiff's return for the year 1915.

3. That at the time $471.03 of the overpayment of the plaintiff's income taxes for the year 1918 was applied to an alleged underpayment for the year 1916, more than five years had expired after the filing of the plaintiff's return for the year 1915.

4. That at the time $69,548.62 of the overpayment of the plaintiff's 1918 taxes was applied to an alleged underpayment for the year 1917, more than five years had expired after the filing of the plaintiff's return for the year 1917.

RULINGS OF LAW.

1. That at the time $348.74 of the overpayment of the plaintiff's 1918 taxes was applied to an alleged underpayment for the year 1915 the determination, assessment and collection of all taxes for the year 1915 was barred by the provisions of Section 250 (d) of the Revenue Act of 1921.

2. That at the time $471.03 of the overpayment of the plaintiff's income taxes for the year 1918 was applied to an alleged underpayment for the year 1916 the determination, assessment and collection of all taxes for the year 1916 was barred by the provisions of Section 250 (d) of the Revenue Act of 1921.

3. That at the time $69,548.62 of the overpayment of the plain-

tiff's 1918 taxes was applied to an alleged underpayment for the year 1917 the determination, assessment and collection of all taxes for the year 1917 was barred by the provisions of Section 250 (d) of the Revenue Act of 1921.

4. That upon all the facts of the case there is no warrant for making any distinction as to whether or not the suit is brought against the Collector of Internal Revenue individually or against the United States. See *Graham* v. *Goodcell*, 51 Supreme Court, 191, 192, where Mr. Justice Hughes says:

> "Nor is there any warrant for making a distinction in this respect between suits which had been brought against the Collector individually and those pending against the United States."

5. That upon all of the facts of the case both the defendant Malley and the defendant Nichols participated in the illegal transaction whereby the plaintiff was deprived of sums of money to which it was rightfully entitled by law and as to each of them there exists probable cause whereon this suit may lie as provided in Section 842 of Title 28 of the Judicial Code (R. S. 989).

6. That upon all the law of the case the application and credit by the Commissioner of Internal Revenue and/or the defendants of the sum of $74,648.39 to the alleged underpayments of the plaintiff's income taxes for the years 1915, 1916 and 1917 constituted an overpayment which should be refunded to the plaintiff as provided in Sections 607 and 609 of the Revenue Act of 1928.

O. W. TAYLOR,
Attorney for the Plaintiff.

PLAINTIFF'S NOTICE TO ADMIT OR DENY FACTS UNDER RULE 48.

[Filed July 25, 1931.]

Take notice that the plaintiff in this case requires the defendant to admit or deny, for the purpose of this case only, the several facts respectively hereunder specified; and the defendants are hereby required, within the time provided in Rule 48 of the Dis-

trict Court of the United States for the District of Massachusetts to admit or deny the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this case.

A copy of this notice has been served upon the United States Attorney at Boston and a copy has also been forwarded to C. M. Charest, Esq., General Counsel, United States Bureau of Internal Revenue, c/o H. C. Clark, Special Attorney, United States Bureau of Internal Revenue, by registered mail.

Dated and filed with the clerk this twenty-fifth day of July, 1931.

O. W. TAYLOR,
Attorney for Plaintiff.

To FREDERICK H. TARR, Esq., *United States Attorney,*
J. DUKE SMITH, Esq.,
Special Assistant to United States Attorney,
C. M. CHAREST, Esq.,
General Counsel, United States Bureau of Internal Revenue,
H. C. CLARK, Esq.,
Special Attorney, United States Bureau of Internal Revenue,
Attorneys for Defendants.

The facts, the admission or denial of which is required, are the following:

1. The plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts with a usual place of business in Boston, Allston District, Suffolk County in said Commonwealth.

2. The defendant John F. Malley is now residing in Boston within the said Commonwealth and was, from the first day of December, 1913 to the thirteenth day of September, 1919, the duly qualified United States Collector of Internal Revenue for the District of Massachusetes.

3. The defendant Malcolm E. Nichols is now residing in Boston, within the said Commonwealth, and was from the first day of August, 1921 to the thirty-first day of August, 1925, the duly qualified United States Collector of Internal Revenue for the District of Massachusetts.

4. The plaintiff seasonably filed its income tax returns for the years 1915, 1916 and 1917, said returns being made upon the basis of the calendar year and thereupon paid to the Collector of Internal Revenue at Boston, Massachusetts, the taxes shown thereon, said returns having been filed on or about March 15, 1916, 1917 and 1918 respectively.

5. The plaintiff has always kept its books of account on the basis of the fiscal year ending June 30 of each and every year and never under the Act of 1918 or any prior or subsequent Revenue Act applied to the Commissioner of Internal Revenue to change its method of accounting from the "fiscal" to the calendar year basis.

6. The plaintiff never at any time filed any bond, claim in abatement or waiver of the statutory period of limitations provided for the determination, assessment and collection of its taxes for the years 1915, 1916 and 1917.

7. On or about June 15, 1919, the plaintiff filed its return for the year 1918 and of the total tax indicated thereon $227,063.28 was paid by the plaintiff to the defendant Malley as Collector of Internal Revenue in three installments on dates and in the amounts following:

Date	Amount
March 19, 1919 . . .	$60,000.00
July 1, 1919	94,466.78
Sept. 17, 1919	72,596.50

8. On or about September 15, 1919, the plaintiff filed an amended return for the year 1918 covering the fiscal period July 1, 1917 to June 30, 1918, and thereon computed the total tax for the taxable year 1918 to be $234,088.50 and with the said amended return the plaintiff filed a claim for abatement of $68,350.33 representing the difference between the tax shown on its said first return and the said amended return filed therewith.

9. On or about October 15, 1920, the plaintiff filed a "Second amended return" for the taxable year July 1, 1917 to June 30, 1918, showing the tax for the said taxable year 1918 to be $127,651.08.

10. On February 2, 1923, the Commissioner of Internal Revenue notified the plaintiff that an examination of its income tax returns, books of account and records disclosed an additional tax liability for the years 1915, 1916 and 1917 aggregating $48,563.39.

11. On or about April 10, 1923, the plaintiff filed a claim on the required Treasury Department form for the refund of $107,826.61 of the taxes it had paid for the taxable year ended June 30, 1918.

12. On May 7, 1923, the Commissioner of Internal Revenue notified the plaintiff that an examination of its income tax returns and books of account for the years 1918 to 1921, inclusive, disclosed an overassessment for the year 1918 in the amount of $156,340.83.

13. On or about May 16, 1924, the Commissioner of Internal Revenue advised the plaintiff that the said $156,340.83 overassessment for the year 1918 had been made on the basis of certificate of overassessment No. 29852 and had been regularly scheduled on November 15, 1923.

14. By the said certificate of overassessment No. 29852 the company was allowed an overassessment for the year 1918 in the amount of $156,340.83, of which sum $75,461.39 was abated, thus making the net actual overpayment allowed to be $80,879.44, of which $2,467.60 was thereupon refunded to the plaintiff, $3,763.99 was properly credited to an underassessment for the year 1920 and $74,648.39 was credited to underpayments for prior years in the respective amounts following:

Year.	Amount.
1915	$348.74
1916	471.03
1917	69,548.62
Total	$74,648.39

15. The "Schedule of Overassessments" No. IT-A-7778, upon which the said overassessment was allowed and forwarded to the Collector at Boston, Massachusetts, for verification and recertification to the Commissioner of Internal Revenue, was dated on or about November 15, 1923.

16. The schedule of refunds and credits upon which the said overassessments appear was finally signed and approved by the Commissioner of Internal Revenue at a date subsequent to November 15, 1923.

17. On July 17, 1929, the plaintiff filed a claim for refund on the form required by law together with a supporting brief for the refund of $74,648.39 or "such greater amount as is legally refundable" and therein claiming that at the time the said sum was credited and applied to alleged underpayments for the years 1915, 1916 and 1917, the period of limitations for the collection and assessment of taxes for said years had expired.

18. On December 9, 1929, the Commissioner of Internal Revenue notified the plaintiff that its said claim was rejected for the reason that "the information in the case indicated a tax liability for the period under consideration equal to or in excess of the amount paid" so that there had been no overpayment of any of the plaintiff's income, war profits or excess profits taxes.

19. The Commissioner of Internal Revenue at any time notified the plaintiff officially or otherwise that the Commissioner's said determination of its taxes for the year 1918 or the said overassessment of $156,340.83 allowed for that year was in any respect erroneous or improper except the said letter of December 9, 1929, wherein the plaintiff's said claim for refund for $74,648.39 was rejected.

O. W. TAYLOR,
Attorney for Plaintiff.

OPINION.

October 13, 1931.

[Published Fed. 2d, .]

LOWELL, J. The plaintiff paid its taxes for the year 1918 to Collector John F. Malley. It filed a petition for a refund, which contained a claim of credit for deficiencies in the years 1915, 1916 and 1917. The petition was granted in the year 1924, and the Commissioner of Internal Revenue issued a certificate of overassessment, which he sent to Malcolm E. Nichols, who had succeeded Malley as collector. On January 3, 1924, Nichols allocated

part of the refund to the payment of deficiencies in the taxes for the years 1915, 1916 and 1917, as the plaintiff had requested, except that a greater amount than that asked was credited to the year 1917. The total of the requested credits was $48,563.39, while the amount credited was $74,648.39. On February 18, 1924, the Commissioner approved this action and paid the balance of the refund to the plaintiff. It is admitted by the Government that these payments were applied to outlawed taxes.

The plaintiff has experienced a change of heart and is now suing to recover the whole amount of credits. It contends that the Commissioner had no power to make these credits owing to the Revenue Act of 1928.

The arguments on both sides took a wide range, and many contentions were made which need not be considered, as in the opinion of this court the plaintiff is precluded from recovery by Sections 607 and 609 of the Revenue Act of 1928 (c. 852, 45 Stats., pp. 874, 875; U. S. C. A. Title 26, § 2607 and 2609). The only discussion of this subject with which I am familiar occurs in the case of *United Motors Corporation* v. *United States*, 44 F. (2d) 407, where Judge Patterson reaches a similar conclusion as to the meaning of these statutes. The sections read as follows:

"§ 2607. Effect of Expiration of Period of Limitation against United States:

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after May 29, 1928) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (May 29, 1928, 8:00 A. M., c. 852, § 607, 45 Stat. 874.)

"§ 2609. Erroneous Credits:

(a) Credit against Barred Deficiency. Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 2607.

(b) Credit of Barred Overpayment. A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 2608.

(c) Application of Section. The provisions of this section shall apply to any credit made before or after May 29, 1928. (May 29, 1928, 8:00 A. M., c. 852, § 609, 45 Stat. 875.)"

The purpose of the statute was to prevent the refund of payments collected by distraint after the period of limitation fixed by the Revenue Act of 1921 had run. It was passed to nullify the effect of the decision in *Bowers* v. *N. Y. & Albany Lighterage Co.*, 273 U. S. 346. See *Graham* v. *Goodcell*, 282 U. S. 409, 417, 418. It was not a remedial act in favor of taxpayers, but was designed to help the taxing authorities.

By Section 607 a tax paid after the period of limitation has ended, as in the present case, is declared to be an overpayment which shall be returned to the taxpayer if a claim has been filed within the prescribed period.

Section 609 relates to credits. Paragraph (a) of that section is poorly drawn. The evident intention is to put credits and refunds upon the same footing and provide that payments on a barred deficiency whether made directly by the taxpayer or indirectly by a credit shall not be disturbed unless a claim for the refund of the taxes paid for that year had been made. If we construe the paragraph strictly, this result will not be reached because of the use of the word "overpayment", which is declared by Section 607 to be a payment on a barred deficiency, and not, as the legislative mind evidently thought, a recoverable overpayment.

In my opinion, paragraph (a) should be construed as if it read: "Any credit . . . shall be void if any payment in respect of such liability would be considered an overpayment as to which the taxpayer is entitled to a refund under Section 607." This construction does some violence to the literal meaning of the statutory words, but the result is so obviously the one intended that it seems to me to be permissible, the more so as there could be no reason for refusing a refund and yet declaring a credit void.

In the case before the court no refund could be made to the plaintiff because no claim has ever been filed for a refund of the taxes for the years 1915, 1916 or 1917. As no refund could be made, the credit is not void.

Judgment for the defendants.

PLAINTIFF'S PETITION FOR APPEAL.

[Filed and Allowed December 7, 1931.]

Now comes the plaintiff, A. C. Harvey Company, a corporation of Cambridge, Massachusetts, and feeling itself greatly aggrieved by the order and judgment made and entered in this court pursuant to a written opinion of Honorable James A. Lowell, District Judge, on October 13, 1931, in favor of the defendants and against the plaintiff, hereby appeals from the said order and judgment to the United States Circuit Court of Appeals for the First Circuit for the reasons set forth in the "Bill of Exceptions" and "Assignment of Errors" filed herein.

Wherefore, the plaintiff prays that its appeal may be allowed and that citation may be issued as provided by law, and that a transcript of the record, proceedings and all other papers upon which the said opinion, order and judgment were based, duly authenticated, be certified and sent to the said United States Circuit Court of Appeals for the First Circuit, under the rules of said court and in accordance with the law in such cases made and provided.

O. W. TAYLOR,

Attorney for Plaintiff, Petitioner.

Petition for appeal allowed December 7, 1931.

J. A. LOWELL,

United States District Judge.

PLAINTIFF'S ASSIGNMENT OF ERRORS.

[Filed December 7, 1931.]

The plaintiff in the above-entitled cause, in connection with its petition for appeal, herein makes the following assignment of errors which it avers occurred at the trial and in the orders and rulings of the court entered herein, to wit:

1. The court erred in directing judgment to be entered for the defendant.

2. The court erred in refusing to grant or to rule upon the plaintiff's requests for findings of fact and rulings of law.

3. The court erred in refusing to direct judgment upon all of the facts and the law of the case to be entered for the plaintiff.

4. The court erred in ordering and ruling "that no refund could be made to the plaintiff because no claim has ever been filed for a refund of taxes for the years 1915, 1916 and 1917".

5. The court erred in ruling that "the plaintiff is precluded from recovery by Sections 607 and 609 of the Revenue Act of 1928".

6. The court erred in ruling that "the purpose of Sections 607 and 609 of the Revenue Act of 1928 was to prevent the refund of taxes collected by distraint after the period of limitations fixed by the Revenue Act of 1928 had run".

7. The court erred in ruling that the word "overpayment" as used in Section 607 of the Revenue Act of 1928 should be construed as if the words "recoverable overpayment" had been used in that section instead of the word "overpayment" alone.

8. The court erred in ruling that Sections 607 and 609 of the Revenue Act of 1928 are not "remedial" provisions in favor of the taxpayer but were designed solely for the benefit of the taxing authorities.

9. The court erred in ruling that paragraph (a) of Section 609 of the Revenue Act of 1928 should be construed as if that section read:

> "Any credit . . . shall be void if any payment in respect of such liability would be considered an overpayment as to which the taxpayer is entitled to a refund under § 607."

10. The court erred in refusing to rule that any tax collected after the period of limitation had expired is "absolutely void" and of no effect whatsoever, as provided in Section 609 of the Revenue Act of 1928.

11. The court erred in refusing to rule that such portion of the allowed and undisputed overpayment of the plaintiff's taxes for the year 1918 as was credited to the alleged taxes for the years 1915, 1916 and 1917, was "absolutely void" and of no effect under Section 609 of the Revenue Act of 1928.

Wherefore, the plaintiff prays that the judgment of the District Court may be reversed.

O. W. TAYLOR,
Attorney for Plaintiff.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PEESIDENT OF THE UNITED STATES,

To JOHN F. MALLEY, *former Collector of Internal Revenue at Boston, and/or* MALCOLM E. NICHOLS, *former Collector of Internal Reveuue at Boston, of Boston, Suffolk County, in the District of Massachusetts,* GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit of Appeals for the First Circuit, in the City of Boston, Massachusetts, on the sixth day of January next, pursuant to an appeal duly obtained from a judgment of the District Court of the United States for the District of Massachusetts, wherein the Arthur C. Harvey Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with a usual place of business in Boston, said Commonwealth, and you are appellees, to show cause, if any there be, why the said judgment entered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JAMES A. LOWELL, Judge of the District Court of the United States for the District of Massachusetts,

this seventh day of December, in the yeor of our Lord one thousand nine hundred and thirty-one.

JAMES A. LOWELL,
United States District Judge.

ACCEPTANCE OF SERVICE OF CITATION ON APPEAL.

UNITED STATES OF AMERICA.
DISTRICT OF MASSACHUSETTS, ss. BOSTON, December 7, 1931.

Service of the within citation on appeal is this day hereby accepted.

FREDERICK H. TARR, *United States Attorney,*
by J. DUKE SMITH, *Special Asst. to U. S. Attorney,*
for Plaintiffs.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the plaintiff, including true copies of such proofs, entries and papers on file as have been agreed upon in the cause entitled,

No. 4819, LAW DOCKET,
ARTHUR C. HARVEY COMPANY, PLAINTIFF,
v.
JOHN F. MALLEY,
FORMER COLLECTOR OF INTERNAL REVENUE,
AND/OR
MALCOLM E. NICHOLS,
FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANTS,

in said District Court determined, together with the original citation with acceptance of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court, at Boston in said District, this third day of February, A. D. 1932.

[SEAL] JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. An order of enlargement of time to, and including, February 4, 1932, is here omitted. A. I. CHARRON, *Clerk.*]

In United States Circuit Court of Appeals for the First Circuit, October Term, 1931

No. 2667

Arthur C. Harvey Company, Plaintiff, Appellant,

v.

John F. Malley and/or Malcolm E. Nichols, Former Collectors of Internal Revenue, Defendants, Appellees

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson, and Morton, JJ.

Opinion of the Court—June 27, 1932

Wilson, J.:

This is an appeal from a judgment of the District Court of Massachusetts in an action at law to recover an alleged overpayment of income taxes for the year 1918. In the first count of its declaration, the plaintiff-appellant seeks to recover of the defendants, jointly and severally, the amount of the alleged overpayment under a count of indebitatus assumpsit; it also seeks to recover of John F. Malley, a former collector of internal revenue, in a second count for money had and received, the amount of the alleged overpayment; and in a third count for money had and received, to recover of Malcolm E. Nichols, the successor of Malley as collector of internal revenue, the amount of the alleged overpayment. Malley was a collector in 1919 when the alleged overpayment occurred, and Nichols, as Malley's successor, under the direction of the Commissioner of Internal Revenue, in 1923 credited the alleged overpayment to deficiencies of prior years.

A motion was filed by each defendant to compel the plaintiff to elect on which count it would proceed, on the ground there was misjoinder of actions and also a misjoinder of parties. The motion was denied and hearing ordered on the merits.

There was a waiver of a jury trial and the case was heard by the judge without a jury. A request for findings of fact

and rulings of law was made by the plaintiff, but no special findings were made nor were the requested rulings of law either made or refused, nor were any exceptions to a refusal to rule as requested taken "in the course of the trial." So far as any rulings of law were made "in the course of the trial," with one exception they were in favor of the plaintiff, and though an exception was allowed in this instance, it is not relied upon in the assignments of error.

The plaintiff assigns as error a refusal to direct that a judgment be entered for the plaintiff; but we do not find in the record any express motion to that effect. The sixth requested ruling that the credit of $74,648.39 (being the amount of an overpayment of the 1918 taxes as determined by the Commissioner in May, 1923), to alleged underpayments for the years 1915, 1916 and 1917 constituted an overpayment for those years under Sections 607 and 609 of the Revenue Act of 1928, and should be refunded to the plaintiff, does not constitute a motion to direct a judgment; since whether a judgment should have been directed for the plaintiff depended upon other considerations than whether the application of an overpayment of the 1918 taxes to 1915, 1916 and 1917 deficiencies was void and constituted an overpayment for those years under Sections 607 and 609 of the Revenue Act of 1928.

It is doubtful, therefore, whether under Sections 649 and 700 R. S. any question of law is raised on the record for the consideration of this court by the appellant's assignments of error. The findings of fact are general, and no rulings of the court were excepted to "during the course of the trial," which are relied on. Exceptions, following an order of judgment, to alleged rulings in a written opinion of the judge assigning reasons for ordering a judgment for either party, are not rulings in the course of the trial. Fleischmann Cons. Co. v. United States, 270 U. S. 349; United States v. Smith, 39 Fed. (2d) 851; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121.

As the court said in Fleishmann Cons. Co. v. United States:

"It is settled by repeated decisions, that in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except in so far as the rulings during the progress of the trial were

excepted to and duly preserved by bill of exceptions as required by the statute. * * * To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. * * * That is, as was said in Humphreys v. Third National Bank, supra, 655, 'he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found, he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits.' "

Each of the assignments of error in this case relates either to matters of fact or to conclusions of law embodied in the opinion. These are not open to review, as there were no special findings of fact and no exceptions to rulings on matters of law were taken during the course of the trial and duly preserved by a bill of exceptions, and no questions of law favorable to the plaintiff are raised on the pleadings.

But assuming that the requested ruling above referred to was in effect a motion to direct a judgment for the plaintiff, and could be considered as denied, and an exception duly taken; or that the ultimate facts upon which the rights of the parties depend were agreed to, and an exception would lie to the order of judgment for the defendant, we still think the judgment of the District Court must be affirmed.

The facts are: That prior to 1918 the plaintiff company had closed its books for its fiscal year on June 30th, but filed its returns, as then required by law, for the years 1915, 1916 and 1917 on the basis of the calendar year. To conform to the Revenue Act of 1918, the plaintiff in March, 1919, made a return for the first six months of 1918, on which return its tax for the six months was assessed as $302,438.83, in accordance with the provisions of Section 226 of the 1918 Act, 40 Stat. 1075. The Commissioner

abated this tax to the amount of $75,461.39, and the appellant voluntarily paid to the defendant Malley as collector in 1919 the balance of $226,977.44.

Later, in September, 1919, the appellant filed an amended return, showing income for the full fiscal year from June 30, 1917, to June 30, 1918; and took, as the tax due for the six months from December 31 to July 1, 1918, the same proportionate part of the tax for the entire fiscal year, computed at the 1918 rates, as the portion of the fiscal year falling in 1918 was of the entire fiscal year in accordance with the provisions of Section 205 of the 1918 Act, 40 Stat. 1061, which resulted, according to its return, in a tax of $234,088.50.

In October, 1920, it filed a second amended return showing the tax for the six months from December 31, 1917, to July 1, 1918, to be only $127,651.08, and claimed that the tax assessed on its original return in March, 1919, was excessive to the amount of $174,787.75. No details of the original assessment, which was evidently computed in accordance with the provisions of Section 226 of the 1918 Act, are furnished.

On April 9, 1923, the plaintiff, as a result of an examination of its books by an internal revenue agent, filed a claim for refund based on the internal revenue agent's report of an alleged overpayment for 1918 of $156,390.41. In this claim, however, the taxpayer recognized that there were deficiencies for the years 1915, 1916 and 1917, and assented to the application of the overpayment to deficiencies for those years, amounting to $48,563.39, leaving a balance of $107,826.61, which it claimed should be refunded. On May 7, 1923, the Commissioner, adopting the view that in changing from a calendar year to a fiscal year the tax for any fractional part of a year should be computed in accordance with the provisions of Section 205 of the 1918 Act, determined that the correct tax for 1918, less the abatement already allowed, and based on the examination of the appellant's books by the revenue agent, was $146,098.00, and that there had been an overpayment of the taxes due from the appellant for the six months in question of $80,-879.44.

In November, 1923, the Commissioner issued his certificate of overassessment for the year 1918, showing the

overpayment of $80,879.44. Certificates of overassessment issued by a Commissioner contain printed instructions to the collector to pay any balance to the taxpayer, after crediting such portion of the overpayment that may be required to make good any deficiencies for previous years shown on the books of the collector.

This direction of the Commissioner was carried out by the defendant Nichols, and $2,467.06 was refunded to the appellant in cash; $3,763.99, it is agreed, was properly credited to certain underassessments for the fiscal year ending June 30, 1920; and $74,648.39 was credited to alleged deficiencies for 1915, 1916 and 1917 in the following amounts: $348.74 for 1915; $4,751.03 for 1916, and $69,548.62 for 1917. But the collection on May 23, 1923, of any additional taxes for the years 1915, 1916 and 1917 was barred by the limitation in Section 250 (d) of the Revenue Act of 1921; and Sections 607 and 609 of the Revenue Act of 1928 declared void any application of credits made after the limitation for collection of taxes.

The appellant's declaration sets forth as a basis of its right of recovery that the Commissioner in May, 1923, allowed a refund of $74,648.39 as an overpayment of the 1918 taxes; that it was erroneously credited by the defendant Nichols to the deficiencies in the 1915, 1916 and 1917 taxes; that on April 9th, 1923, the plaintiff filed a claim for a refund of $107,826.61, and on July 27, 1929, it filed another claim for a refund of the sum of $74,648.39, which the Commissioner had determined in May, 1923, in accordance with the provisions of Section 205 of the 1918 Act, was the amount of the overpayment of the 1918 taxes; that the claim filed in July, 1929, was denied, and, as the appellant contends, in accordance with the provisions of Section 3226 R. S., this action was brought within two years after the denial of its claim for a refund.

To avoid the objection that its suit, begun in 1930, was not brought within five years of the alleged overpayment, which was in 1919, the appellant asserts that the claim filed in 1929 was only a reassertion of its claim filed in 1923; and having filed a claim for a refund within four years of the payment of the tax, and since the claim filed in July, 1929, being a reassertion of its claim filed in 1923, was disallowed, and this action was brought within two

years of the disallowance, the provisions of Section 3226 R. S. were complied with.

But the claim filed in April, 1923, was allowed by the Commissioner, though for a different amount. The only ground of action the appellant had after the allowance of its claim in May, 1923, must have been either on the certificate of overassessment issued on the latter date by the Commissioner, or against the defendant Nichols personally for an erroneous application of the alleged overpayment to taxes already barred; but on the record, as will later appear, there was no overpayment of the 1918 tax, and the appellant was therefore not harmed by the act of the defendant Nichols. In respect to Malley's liability under the first count, it is also difficult to see how his act in accepting the payment of the taxes found due by the Commissioner based on the taxpayer's own return, could expose him to any action by the taxpayer, except for money had and received in case a refund was duly claimed and denied. But a claim for a refund barred by the statute cannot be revived by filing a new claim and basing an action on its denial.

If the appellant had declared as on an account stated, or a promise to pay by reason of the certificate of overassessment issued by the collector in May, 1923, as in Bonwit Teller & Co. v. United States, 283 U. S. 258, 265, we think its action would have to be brought against the United States, as neither of the defendants had anything to do with issuing of the certificate of overassessment or were privy to any promise therein contained, either express or implied, to refund the overpayment.

The acts performed by Malley or Nichols as collectors were ministerial, United States v. Swift & Co., 282 U. S. 468, and were done in the discharge of their several duties as a collector. Heffernan v. Alexander, 48 Fed. (2d) 855; Penn Smokeless Coal Co. v. Lewellyn, 26 Fed. (2d) 743; Semple v. Lewellyn, 1 Fed. (2d) 745, 748-9. The application of credits to deficiencies of other years by a collector, as shown by his books, is of no effect until approved by the Commissioner. United States v. Swift & Co., supra.

Whether or not the claim filed by the appellant in April, 1923, for a refund based on an examination of its books by an internal revenue agent, together with the claim filed on

July 29, 1929, was a sufficient compliance with Section 3226 R. S. on which to base an action against a collector for money had and received, or whether the application by the defendant Nichols of the alleged overpayment of the 1918 taxes to an assessment already barred must be regarded as an erroneous collection, Graham et al. v. Goodcell, 282 U. S. 409, 424, is really not important in this case; since to recover in such form of action the taxpayer must prove that the government has money in its possession justly belonging to the taxpayer.

"Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded." Lewis v. Reynolds, 284 U. S. 281, 283.

The record shows that when the second claim for refund was filed in July, 1929, the Commissioner, apparently under advice of counsel, made a redetermination of the 1918 tax for the six months from December 31, 1917, to July 1st, 1918, which he had a right to do, though he could not collect any additional tax, Lewis v. Reynolds, supra, and found that the previous assessment in May, 1923, which showed an overpayment of $74,648.39 was erroneous, the former computation having been based on Section 205 of the 1918 Act.

The appellant's tax in question was for a period entirely within the year 1918; and under Section 226 of the 1918 Act, 40 Stat. 1075, where a change is made from a calendar year to a fiscal year, and a portion of the first tax assessed under the 1918 Act was for a fractional part of the year 1918, the tax for the period shall be computed in the manner provided and at the rate for the calendar year in which the period falls. Appeal of Henry D. Weed, 2 B. T. A. 84.

Determined under Section 226, the tax assessed in 1919 on the taxpayer's original return of March, 1919, to the amount of $302,524.65, less the abatement of $75,461.39, so far as anything appears in the record, was correct, and there was, therefore, no overpayment. At least, the record does not disclose any error. The burden in such cases, in an action against a collector for money had and received, is on the plaintiff to show that the Government has money

justly belonging to the plaintiff. This burden the appellant has not sustained in this case.

The statement of the Deputy Commissioner in his letter to the appellant in December, 1929, denying its claim filed in July, 1929, that such portion of the overassessment which has not been refunded, having been credited against tax liabilities for prior years, will not be refunded, we interpret to be merely a categorical denial of the refund claim according to its terms, and that the reason assigned for the rejection of the claim was that the alleged overassessment in May, 1923, was erroneously allowed in its entirety. In other words, there was no overassessment, and therefore the refunding of that part of the alleged overassessment which was on the books of the collector applied to prior tax liabilities was denied, because no such overassessment and overpayment occurred.

The judgment of the District Court is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1931.

No. 2667.

ARTHUR C. HARVEY COMPANY,
PLAINTIFF-APPELLANT,
v.
JOHN F. MALLEY, FORMER COLLECTOR,
AND/OR
MALCOLM E. NICHOLS, FORMER COLLECTOR,
DEFENDANTS-APPELLEES.

APPELLANT'S PETITION FOR REHEARING.

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes Arthur C. Harvey Company, the plaintiff-appellant in the above-entitled case, and respectfully petitions for a rehearing and earnestly prays that this Honorable Court may reconsider its judgment rendered herein on June 27, 1932, for the following reasons:

First: Your petitioner has never been granted the opportunity fully to present all of its evidence, arguments and authorities in support of the cause of action as set forth in its declaration, as is clearly shown (1) by the true excerpt from the stenographic report of the trial together with the reporter's certificate under oath and (2) by a planographic reproduction of a letter written by the District Judge "after the trial" (see pp. 10–15, *infra*), all of which are by reference incorporated herein and expressly made a part of this petition.

Second: The opinion of this Honorable Court seems to assume, as a matter of fact, that the plaintiff did not make an overpayment of its taxes for the fiscal year 1918, whereas (1) the Certifi-

cate of Overassessment (Rec. p. 31), (2) the Schedule of Overassessment (Rec. p. 37), (3) the Schedule of Refunds and Credits (R. p. 37), all of which were put in evidence as valid documents by the Government, as well as (4) the Commissioner's letter of May 7, 1923 (R. pp. 23–28), which was put in evidence by the plaintiff, ***show conclusively that your petitioner did overpay its taxes for the taxable year 1918.***

Third: It is obvious error for this Honorable Court to hold that there was no overpayment of your petitioner's 1918 taxes, when the whole opinion of the District Court is predicated solely upon a conclusive finding of fact *that there was such overpayment*, which your petitioner respectfully submits is binding upon this Honorable Court.

Fourth: The opinion of the District Court disregards its own rulings made "in the course of the trial" and decides the case upon findings of fact not supported by the evidence, and a question of law "which was not discussed at the trial or noticed in the briefs" or embodied in any requests for findings or rulings made by the defendants "in the course of the trial".

Fifth: The opinion of this Honorable Court entirely disregards the vital fact that the District Court, "in the course of the trial", and upon the admissions of counsel for the defendants, found upon all the facts and ruled as a matter of law that the paintiff had "made out a prima facie case" (R. p. 16).

Sixth: The opinion of this Honorable Court entirely disregards the questions of fact and of law upon which the decision of the District Court rests, and discusses adversely to your petitioner other questions of fact which do not seem to be sustained by the record, and many technical questions of procedure which were not urged in the oral arguments or in the briefs, before this Honorable Court.

Seventh: The finding and ruling of the District Court to the effect that the plaintiff "had made out a prima facie case" which were not excepted to or overcome by any evidence presented by the defendants, was a "finding of the Court upon facts" as provided in Section 649 of the Revised Statutes (U. S. C. A. 28, 773).

Eighth: Since "the rulings of the Court in the progress of the trial" were in favor of the plaintiff and were not "excepted to at the time", or "duly presented in a bill of exceptions" filed by the defendants, those rulings are conclusive and binding upon this Honorable Court by the provisions of Section 700 of the Revised Statutes (U. S. C. A. 28, 875).

Ninth: The opinion of this Honorable Court erroneously holds, as a matter of fact, that the Commissioner of Internal Revenue "made a redetermination of the 1918 tax for the six months from December 31, 1918 to July 1, 1918", under Section 226 of the Revenue Act of 1918, but the evidence in the case shows clearly and conclusively that the only determination which the Commissioner ever made, in the manner and form required by the applicable statutes, was made under Section 205 (a) of the Revenue Act of 1918.

Tenth: The record in the case, even though rendered unsatisfactory by a combination of unfortunate circumstances which your petitioner could not reasonably be expected to have prevented, nevertheless sufficiently reveals the ultimate facts of the case and raises five questions for the decision of this Honorable Court, to wit:

1. Whether your petitioner actually made an overpayment of its taxes for the taxable year ended June 30, 1918, as the District Court found and ruled that it did.

2. Whether your petitioner's taxes for the taxable year ended June 30, 1918, should be computed under Section 205 (a) of the Revenue Act of 1918 or under Section 226 of that Act.

3. Whether the credits in 1923, of the allowed overpayment of your petitioner's taxes for the taxable year ended June 30, 1918, were rendered absolutely void and of no effect whatsoever by the provisions of Section 609 of the Revenue Act of 1928.

4. Whether the plaintiff in this suit has a good cause of action against the defendant Malley, to whom your petitioner's 1918 taxes were paid.

5. Whether the suit was begun within "two years of the disallowance of the part of such claim to which such suit or proceeding relates", as provided in Section 3226 of the Revised Statutes (43 Stat. c. 234, p. 342).

Eleventh: The opinion of this Honorable Court seems clearly to be in error in citing with approval the *Appeal of Henry D. Weed*, 2 B. T. A. 84, to show that your petitioner's 1918 taxes should be computed under Section 226 of the Revenue Act of 1918, because the application which this Court has made of the Henry D. Weed decision is directly in conflict (1) with the comments contained in that decision itself as well as (2) with the later decision of the Board of Tax Appeals in "*Appeal in Paso Robles Mercantile Company* v. *Commissioner*, 12 B. T. A. 750", which was affirmed by the Circuit Court of Appeals for the Ninth Circuit, *33 Fed. (2) 653*, and certiorari denied, *280 U. S. 595*, and (3) with the recent decision of the United States Supreme Court in the case of *American Hide and Leather Company* v. *United States, 52 S. Ct. 154*, all of which is more fully shown in the brief filed herewith in support of this Petition.

Wherefore your petitioner earnestly prays this Honorable Court as follows:

1. That the Court reconsider its opinion rendered herein on June 27, 1932.

2. That the Court grant your petitioner a rehearing before this Honorable Court, or, in the alternative.

3. That the judgment entered herein be vacated and the case remanded to the District Court for retrial.

4. That your petitioner be granted the right to be heard in oral argument for the allowance of this petition before the same shall be denied by this Honorable Court.

Respectfully submitted,

ARTHUR C. HARVEY COMPANY,

by O. WALKER TAYLOR,

its Attorney.

CERTIFICATE OF COUNSEL.

I, O. Walker Taylor, counsel for Arthur C. Harvey Company, hereby certify that I have prepared the above Petition; that it is presented to this Honorable Court at the request of and with the full approval of your Petitioner; that it is presented in good faith and not for the purpose of delay; that all of the allegations of fact contained therein are true to the best of my knowledge and belief and that there are good and substantial grounds for the allowance of the same in law and in justice.

O. WALKER TAYLOR.

CERTIFICATE OF PETITIONER.

We, Murray C. Harvey and Edward T. Edmands, Vice-President and Clerk, and Treasurer, respectively, of the Arthur C. Harvey Company, a corporation, petitioner herein, under and by virtue of the authority of the board of directors, hereby certify that we have read the foregoing petition and that the same is filed with our full consent and approval; that it is presented in good faith and with a firm belief in the fundamental merits of the case; that all of the allegations of fact contained therein are true to the best of our knowledge and belief, and that there are good and substantial grounds for the allowance of the same.

With reference to certain remarks made by H. C. Clark, Esq., of the General Counsel's office, in his oral argument before this Honorable Court, we certify to the good faith and integrity of our counsel, O. Walker Taylor, who prepared the foregoing petition.

In witness whereof, we have hereunto set our hands and seals and caused the corporate seal to be affixed hereto this twenty-second day of July, 1932.

MURRAY C. HARVEY,

[SEAL] *Vice-President and Clerk.*

EDWARD T. EDMANDS,

[SEAL] *Treasurer.*

itself offered in evidence as a valid document. All of the findings of fact and rulings of law, "in the course of the trial", were in favor of the plaintiff and could not very well have been objected to. "After the trial", however, the District Court completely changed its mind, disregarded all of its rulings made "during the course of the trial" and decided the case "on a question which was not discussed at the hearing or noticed in the briefs".

Your petitioner realizes and has always realized that the fundamental question involved in the case is whether or not the petitioner actually made an overpayment of its 1918 taxes and that the burden of proving such overpayment rested upon the plaintiff. This question, as we shall presently show, turns upon the further question of whether or not your petitioner's taxes for its fiscal year ended June 30, 1918, should be computed under Section 205 (a) of the Revenue Act of 1918, or under Section 226 of that Act. We respectfully invite the attention of the Court to the meaning of these two sections and their applicability in the case at bar as indicated by the decided cases and authorities cited below. If the District Court had permitted the plaintiff to put in its whole case in the regular and orderly manner, many of the objections to the Record which are commented upon in the opinion of this Honorable Court could have been avoided. When the Court ruled that the plaintiff *"had made out a prima facie case"* on the basis of the Certificate of Overassessment (R. p. 31) *that ruling was a conclusive and binding ruling of law and finding of fact that the plaintiff had actually overpaid its 1918 taxes.*

In order that this Honorable Court may be fully advised as to the manner in which the case was tried and decided in the District Court, your petitioner trusts that it may with propriety, and solely for the purposes of this petition, present here (1) a certified copy of a portion of the stenographic record of the trial and (2) a letter which the District Judge addressed to counsel for the petitioner "after the trial" when it was too late to put in any new evidence and take exceptions "in the course of the trial" on any of the findings and rulings upon which the decision of the District Court rests.

1. The Stenographic Record of the Trial (pp. 9–15) is as follows:

"Mr. CLARK. (For defendants.) We take the position that neither of these defendants can be sued in this action, and, if it would be of any assistance to Mr. Taylor in enabling him to elect with any more assurance, I am perfectly willing to outline our defense now.

The COURT. All right; do so.

Mr. CLARK. (For defendants.) We say that the only proper defendant in an action of this kind, assuming that the action must first have been properly brought in time and so on, would be the defendant Malley. We say that the defendant Nichols cannot be subjected to a suit on any set of facts such as we have here under any conditions.

The COURT. Well, now, I do not get you there.

Mr. CLARK. (For defendants.) I will be glad to explain.

The COURT. The only thing that bothered these people was that they credited the money which had been decided to be an overpayment on the part of an unpaid tax which was outlawed.

Mr. CLARK. (For defendants.) Yes, your Honor. I think that would explain it with reference to the facts we have here. This overassessment for the year 1918 was determined by the Commissioner of Internal Revenue, Mr. Blair, in Washington. That is the certificate of overassessment issued either in 1923 or not later than February, 1924.

The COURT. I believe there is grave doubt on this thing. I think we are wasting time over this thing. Your motions (defendants' motions to elect, Rec. pp. 10, 11) are overruled, and you may proceed with the case, and I will save your exception. Proceed, gentlemen."

Mr. TAYLOR. (For plaintiff.) Your Honor, briefly, the facts in this case are these. The evidence which we shall show is, first, that up to 1917, as the law required, this plaintiff had made all of its returns on a calendar year basis. The law required that the income be reported on the calendar

year regardless of the method of accounting which had been employed by the taxpayer. Under Section 212 of the Act of 1918, which became effective in 1919, or issued at least in 1919, every taxpayer was required to make its return on the basis upon which its books of account were kept. Now, of course, the law also provided that, with the permission of the Commissioner, a taxpayer might change and make his return on a different basis.

The COURT. I do not see what that has got to do with the question of a credit being made of something which had been outlawed.

Mr. TAYLOR. (For plaintiff.) Yes, your Honor, it has. I am sure—

The COURT. I am seeking for advice.

Mr. TAYLOR. (For plaintiff.) Of course, I guess we know so much about the case, your Honor is not quite—we have had so many of these details, I know it seems pretty difficult but I hope to make it clear. It will not be long.

The fact of the matter is that when this 1918 law came in for the fiscal year ending June 30th, the taxpayer did not know what to do. There was a lapse in there. They made their return for the year 1917, the full year. Now if they made a return for 1918 on the basis upon which the books were kept they would overlap into 1917. So most corporations did not know what to do in that situation. This corporation made the mistake in the first instance of filing a return covering its income from January 1 to June 30, 1918, just covering a period of six months, which was entirely improper and not in accordance with the 1918 Act.

Now it so happened here also that the taxes as shown on that return to be clearly erroneous were some $302,000. Later on the company filed an amended return, entirely in accordance with the provisions of Section 212 of the Acts of 1918, taking the entire fiscal period and dividing it by that proportion which fell in 1918, as the law required. That

resulted in this overassessment which we are seeking to recover.

The Commissioner did not examine either the original or the amended return until 1923, when all taxes for 1915, 1916 and 1917 were outlawed, and he discovered this overpayment based upon the proper return for the year 1918 and applied it to these outlawed taxes for the other years.

When the Act of 1928 came through, Section 607 said such an application of credit was an overpayment, and we immediately filed a claim, having previously filed a claim back in 1923, and the Commissioner answered by saying—or at least the General Counsel did—the Commissioner has never made any determination but on the recommendation of the General Counsel this refund was denied on the ground that the first six months' return—and we shall put in the letter on that, your Honor, saying that that was the ground, the sole ground upon which the Commissioner denied this refund, namely, that the true taxes for this company for this year were $302,000, and that therefore there was no overpayment for the year 1918, and it must follow, therefore, that there was nothing credited to any outlawed taxes for 1915, 1916 and 1917. That is the contention.

The COURT. Well, that is just about as clear to me as mud. I thought your statement, to begin with, or your declaration said that it had been declared to you that you had made an overpayment?

Mr. TAYLOR. (For plaintiff.) It did, your Honor, back in 1923; but when we filed a claim under the Act of 1928, the General Counsel's office completely changed that, undertakes to repudiate that determination, the certificate of overassessment and everything else, on the ground that the fiscal year return was erroneous. Now the only reason I am going into that is, out of an abundance of caution, to prevent them from asserting that as a matter of defense here, and I think that—

The COURT. Is there any question as to when it was told

to you that the amount of overpayment had been allocated to the deficiency of some other earlier tax?

Mr. TAYLOR. (For plaintiff.) No, sir, your Honor. We have the Certificate of Overassessment and the letters on that, which clearly show. We also have a letter allowing the overassessment which clearly shows that that was applied to these years, 1915, 1916 and 1917, after the period of limitation, which was five years, had expired. There is no question on that. The only question and what I am trying to avoid is the attempt in this suit of counsel for the Government to repudiate that original determination and certificate of overassessment by the Commissioner, which is just what they attempted to do in the letter in which they denied our claim, and that is why I was trying to go into all that, your Honor. **I think they are going to raise the question as to which return was proper, and we are prepared and we want to put in evidence on that.**

The COURT. Well, you sue because these allocations for past years were made after the statute had run. That is your suit, is it not?

Mr. TAYLOR. (For plaintiff.) Yes.

The COURT. (To counsel for defendants.) What do you say to that? In other words, if the certificate of overassessment, whatever it is, is valid—I understand you to say it is not valid but if it is valid—then it was too late after that to use this extra money in paying the former deficiencies. Do you admit that?

Mr. CLARK. (For defendants.) Yes, your Honor.

The COURT. All right.

Mr. CLARK. (For defendants.) The first thing that we are confronted with—

The Court. All right; I rule that Mr. Taylor has made out a prima facie case. I will hear you.

Mr. CLARK. (For defendants.) Would it be of any assistance if your Honor were to be informed briefly of the nature

of our defense so that you might follow the case as it proceeds?

The COURT. Are you talking about "briefly"? Considering this case has taken about 8 years, I assume it will not be brief. I will hear your defense now, briefly, or longly, or in any way you want. You admit that, if the certificate of overassessment is valid, then the statute of limitations had run?

Mr. CLARK. (For defendants.) For collection.

The COURT. I understood you to say so.

Mr. CLARK. (For defendants.) That is right.

The Court. Then I rule that the allocation of part of this money which the Government had to the payment of past deficiency was wrong, and therefore Mr. Taylor has made out a prima facie case, and I will hear you for the defense.

Mr. TAYLOR. (For plaintiff.) Your Honor—

The COURT. I would not advise you to speak. I may change my mind as to you. "Silence is golden", Mr. Taylor; proceed, sir.

Mr. CLARK. (For defendants.) I would proceed a little informally because we do not want to build too big a record on the part of the defendant.

The COURT. Most court proceedings, in my judgment, when they become too formal are absolute rot. I try to get down to the issue as quickly and as far as I can. Now I will hear you.

Mr. CLARK. We will offer a certified copy of the certificate of overassessment. In conjunction with that, we will offer a certified copy of the schedule of overassessments and schedule of refunds and ask that they be marked as 'Exhibits A, B and C'."

United States Courts
Boston

Chambers of
James A. Lowell
District Judge

September 28, 1951.

Dear Mr. Taylor:

I have been wrestling with the Harvey case with much perturbation of spirit and considerable profanity. As the matter stands in my mind now I shall decide the case on a question which was not discussed at the hearing or noticed in the briefs.

I am sending you a copy of a draft opinion which I have prepared, which, however, may not be final. I should like a re-argument on this sole question, - whether the credit in the Harvey case is not void because under Sections 607 and 609 a refund could not be had for the taxes of the years 1915, 1916 and 1917, as no claim for refund of those taxes had ever been filed.

I have told Mr. Smith that I wanted a re-hearing, and have asked him to confer with you and arrange as early a date as possible for it. Please get together with Mr. Smith and arrange for an early re-argument.

Very truly yours,

James A. Lowell

O. Walker Taylor, Esq.,
11 Beacon Street,
Boston, Massachusetts.

Reporter's Certificate.

Commonwealth of Massachusetts,)
County of Suffolk,) ss.
District of Massachusetts.)

Richard J. Martin, being first duly sworn, on oath says that he is a shorthand reporter, regularly practising in the Federal and State courts in said County of Suffolk, and, associated with Horace A. Edgecomb, shorthand reporter, the official reporter designated by the Department of Justice for reporting trials in the District of Massachusetts in which the United States is a party; that, as such reporter, he the said Martin attended the hearing in the matter of Arthur C. Harvey Company, plaintiff, versus John F. Malley et al., defendants, before Judge Lowell, in the United States District Court sitting at the City of Boston, District of Massachusetts, on August 6, 1931, and reported in shorthand the testimony offered and all proceedings had at said hearing before said Judge and caused the same to be transcribed in typewriting, and that the foregoing is a true and correct excerpt from the proceedings had therein.

Dated at Boston, Massachusetts, this 20th day of July, A. D. 1932. RICHARD J. MARTIN.

Subscribed and sworn to before me this 20th day of July, A. D. 1932. Hope Thompson Hanna
[SEAL] Notary Public.
My commission expires April 8, 1938.

2. A facsimile reproduction of a letter written to counsel for the plaintiff on September 28, 1931, is shown on the opposite page. Upon receipt of that letter the undersigned counsel for your petitioner and Mr. Smith for the defendants conferred with Judge Lowell in Chambers and were advised that the "reargument" referred to in the letter would be limited entirely to written briefs and that the Court would not allow a motion for a new trial at that time or permit the introduction of further evidence. The plaintiff

thereupon submitted a brief in which it fully set forth arguments and authorities to show that, by Section 609 of the Revenue Act of 1928, the credits of the allowed overpayment for 1918, to the outlawed taxes for 1915, 1916 and 1917, were absolutely void and of no effect whatsoever so that there was no payment of any taxes for 1915, 1916 and 1917, and it must follow that the plaintiff could not be required to have filed a claim for refund of taxes for those years.

Your petitioner respectfully submits that it is obvious from the foregoing document and statements that a full and fair trial of the case on its merits was not had or allowed in the District Court since under the circumstances as above outlined your petitioner could not take such exception "in the course of the trial" as the opinion of this Honorable Court holds that it should have done.

II.

THE EVIDENCE SHOWN IN THE RECORD CONCLUSIVELY PROVES THAT YOUR PETITIONER DID ACTUALLY MAKE AN OVERPAYMENT OF ITS TAXES FOR ITS FISCAL YEAR ENDED JUNE 30, 1918.

As to the fact of whether or not such overpayment was actually made, the opinion of this Honorable Court states as follows:

> "The burden in such cases, in an action against a collector for money had and received, is on the plaintiff to show that the Government has money justly belonging to the plaintiff. This burden the appellant has not sustained in this case."

Your petitioner respectfully submits that (1) the Certificate of Overassment (R. p. 31), (2) the Schedule of Overassessment (R. p. 37) and (3) the Schedule of Refunds and Credits (R. p. 37), all of which were offered in evidence by the defendants as valid documents, as well as (4) the Commissioner's letter of May 7, 1923 (R. pp. 23–28), which was put in evidence by the plaintiff, conclusively show that the plaintiff actually overpaid its taxes for the year 1918. In the brief submitted and in the oral argument before this Honorable Court the Government has never contended that the plaintiff did not overpay its 1918 tax. If it had done so, how could it have

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1932

No. 2667

ARTHUR C. HARVEY COMPANY, Plaintiff, Appellant,

v.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS, Former Collectors of Internal Revenue, Defendants, Appellees

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson, and Morton, JJ.

OPINION OF THE COURT ON MOTION FOR RECONSIDERATION, ETC.—October 11, 1932

WILSON, J.:

The plaintiff in this case filed a petition for a rehearing, which has been denied. It now asks to be heard orally on the question of the proper method of computing taxes under Secs. 205 and 226 of the 1918 Act in order that this court may correct what plaintiff's counsel conceives to be an error on the part of the court in interpreting these two sections.

Rule 29 requires that petitions for rehearing shall be filed within fifteen days after judgment. Plaintiff's motion is in effect a petition for rehearing in another guise. To establish a practice of granting such a motion, filed after the time has elapsed for filing a petition for rehearing, would render the rule nugatory. Furthermore, we do not think the grounds assigned by counsel have any merit.

The plaintiff's fiscal year ended on June 30. Prior to 1918 it had filed its returns on the basis of the calendar year. Under Sec. 226 of the 1918 Act it was obliged to file its returns on the basis of its fiscal year and a separate return for the period from December 31, 1917, to July 1, 1918. Counsel originally contended that the tax for this latter period should be computed according to the provisions of Sec. 205, but counsel now contends that whether

computed under Sec. 205 or Sec. 226, the result is the same.

Section 205 of the 1918 Act covered cases where the taxpayer made a return for a fiscal year beginning in 1917 and ending in 1918, while Sec. 226 applied to cases where the taxpayer had filed a return for the calendar year of 1917, but its fiscal year differed from the calendar year, in which case Sec. 226 provided that "a separate return shall be made for the period between the close of the last calendar year for which a return was made (in this case Dec. 31, 1917) and the date designated as the close of the fiscal year."

Under Sec. 205 the tax for the entire fiscal year beginning in 1917 and ending in 1918, and computed in accordance with that section, was apportioned according to the part of the fiscal year falling within each of the calendar years.

Counsel contends, apparently basing his contention on some language in the opinion in American Hide & Leather Company v. United States, 284 U. S. 343, 351, that the gross income and deductions for the entire fiscal year of 1917-1918 should be apportioned to the part of the fiscal year falling in 1918, and the tax computed on the net income thus obtained for that period, which, of course, assuming the gross income and deductions are agreed to, would produce the same result as if computed under Sec. 205.

But the question of how the tax should be computed under Sec. 226 was not in issue in the American Hide & Leather Company case, and the language in the opinion on which counsel relies, being obviously dictum, should not control this court, since it is not only contrary to the language of the statute, but would produce inequitable results.

To illustrate: Let us assume that the plaintiff corporation had a taxable income during the period from June 30, 1917, to January 1, 1918, of $50,000, on which, since it made its return for the year 1917 on the basis of the calendar year, it had already paid a tax under the 1916 Act, and from December 31, 1917, to July 1, 1918, its taxable income was $150,000. Applying the theory of the plaintiff's counsel, it would in such case be taxed on an income of only $100,000 during the period from December 31, 1917, to July 1, 1918, although its taxable income during that period was $150,000. In other words, under such an interpretation of Sec. 226 it would escape taxation on $50,000.

To state the converse of this: Assuming that its taxable income during the last half of the calendar year of 1917 was $150,000, and for the first half of 1918 was only $50,000, the taxpayer under the 1916 Act, making a return for the calendar year of 1917, would have already paid a tax on $150,000 of income; yet, according to the theory of counsel for the plaintiff, its return for the period of the fiscal year falling in 1918 should show a taxable income of $100,000, and as a result he would not only pay a tax on the $50,000 actually earned in the period of the fiscal year falling in 1918, but a double tax on $50,000 more earned in 1917.

Nothing more is needed to show that such could not have been the intent of Congress, when it said in Sec. 226 that, if a change were made from a calendar year to a fiscal year, "a separate return should be made for the period between the close of the last calendar year for which a return was made and the date designated as the close of the fiscal year."

It is clear that without the original return made in March, 1919, for the first six months of the year 1918, it cannot be shown that there was error in the denial of a refund by the Commissioner, assuming that the claim for refund had been filed within the time limit fixed by the statute.

Motion denied.

On April 14, 1932, this case came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the twenty-seventh day of June, A. D. 1932, the opinion of the court (page 63) was filed, and the following Judgment entered:

In United States Circuit Court of Appeals

Judgment—June 27, 1932

This cause came on to be heard April 14, 1932, upon the transcript of record of the District Court of the United

States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, June 27, 1932, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on July 26, 1932, a petition for rehearing (page 71) was filed, and on August 5, 1932, the following Order of Court was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING REHEARING—August 5, 1932

No judge who concurred in the opinion announced June 27, 1932, desiring a rehearing, it is ordered that the petition for rehearing filed July 26, 1932, be and the same hereby is denied.

By the Court.

Arthur I. Charron, Clerk.

MEMORANDUM RE STAY OF MANDATE

Thereafter, to wit, on August 23, 1932, mandate was stayed until further order of court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

APPELLANT'S MOTION TO BE HEARD IN ORAL ARGUMENT ON THE QUESTION OF THE PROPER METHOD OF COMPUTING THE TAXES—Filed September 19, 1932

Now comes the appellant in the above-entitled case and moves (1) that the order of August 5, 1932, denying the petition for a rehearing, be modified, and (2) that the appellant be granted the opportunity to present oral argument and authorities limited solely to the matter of the computa-

tion of the appellant's taxes for the six months' period ended June 30, 1918, a question which was not argued or discussed in the briefs either in the District Court or in this court, but which was raised and commented on for the first time in the opinion of this Honorable Court rendered herein on June 27, 1932, to wit:

Whether, as the opinion of this court holds, the correct computation of the appellant's taxes for the six months' period ended June 30, 1918, under Section 226 of the Revenue Act of 1918, "actually" results in the amount of $302,524.65 and "no overpayment".

The comments in the opinion which raise the question are as follows:

"The record shows that when the second claim for refund was filed in July, 1929, the Commissioner, apparently under advice of counsel, made a redetermination of the 1918 tax for the six months from December 31, 1917 to July 1st, 1918, which he had a right to do, though he could not collect any additional tax, Lewis v. Reynolds, supra, and found that the previous assessment in May, 1923, which showed an overpayment of $74,648.39 was erroneous, the former computation having been based on Section 205 of the 1918 Act.

The appellant's tax in question was for a period entirely within the year 1918; and under Section 226 of the 1918 Act, 45 Stat. 1075, where a change is made from a calendar year to a fiscal year, and a portion of the first tax assessed under the 1918 Act was for a fractional part of the year 1918, the tax for the period shall be computed in the manner provided and at the rate for the calendar year in which the period falls. Appeal of Henry D. Weed, 2 B. T. A. 84.

Determined under Section 226, the tax assessed in 1919 on the taxpayer's original return of March, 1919, to the amount of $302,524.65, less the abatement of $75,461.39, so far as anything appears in the record, was correct, and there was, therefore, no overpayment. At least, the record does not disclose any error. The burden in such cases, in an action against a collector for money had and received, is on the plaintiff to show that the Government has money justly belonging to the plaintiff. This burden the appellant had not sustained in this case."

Grounds for the Allowance of this Motion

The appellant respectfully submits:

I. That this Honorable Court has entirely misunderstood the method of computation prescribed by Section 226 as interpreted by both the Supreme Court and the Board of Tax Appeals.

II. That as a matter of fact and arithmetic there is no difference whatever in the amount of the appellant's taxes, for the six months' period, whether the computation be made under Section 226 or under Section 205 of the Act, the correct tax in either instance amounting to only $146,098.00.

III. That in its ultimate analysis the opinion of this Honorable Court holds that the Commissioner "had a right" to determine a tax of $302,524.67 upon a statutory income of only $247,695.20, which is obviously in error.

I

Under Section 226 of the Act the proper method of computing the taxes for only six months of a taxpayer's fiscal year is accomplished by first ascertaining the total items of income, deductions and credits for the entire fiscal year, dividing these items by two since the period is six-twelfths or one-half of the entire taxable year, and then calculating the taxes upon the net income thus obtained.

American Hide and Leather Co. v. United States, 52 S. Ct. 154.

Appeal of Henry D. Weed, 2 B. T. A. 84.

Appeal in Paso Robles Mercantile Co., 12 B. T. A. 750. (Affirmed C. C. A. Ninth Circuit, 33 Fed. (2) 653.) (Certiorari denied, 280 U. S. 595.)

The case of the American Hide and Leather Company v. United States, supra, is directly in point. That company had always kept its books of account on the basis of the fiscal year ending June 30, just as appellant company has done in the case at bar. The question arose as to the proper method of computing the taxes for the six months' period ended June 30, 1918. The American Hide and

Leather Company made an erroneous original return for the entire calendar year 1918. In the case at bar the appellant company made an erroneous return for only six months of the calendar year 1918. In holding that the American Hide and Leather Company was not bound by its erroneous return but that its taxes for the six months period should be properly computed under Section 226 of the Act, Mr. Justice Stone, who delivered the opinion of the court, said:

"There is no basis for the contention of petitioner that the taxes paid for each calendar year should be divided and one-half applied to tax due for the first six months and one-half for tax accruing in the last six months of the year. We think neither the circumstances nor the applicable statute permits such an allocation. Section 226 of the 1918 act authorizes the calculation of the tax for that part of a fiscal year falling between the beginning of the calendar year and the end of the fiscal year by the apportionment of gross income and deductions for the *fiscal year, pro rata to the taxable fiscal period, in order to arrive at net income for the latter. See Appeal of Weed, 2 B. T. A. 84."

NOTE.—The attention of the Court is called to the fact that in most of the early opinions published of the American Hide and Leather Company there was a typographical error. The word "calendar" appears instead of the word "fiscal" which we have starred in the above quotation. A certified copy of the decision from the clerk of the Supreme Court shows that this error was later corrected by the court by changing the word "calendar" to "fiscal" so that the opinion as finally approved reads as quoted above.

As to the case of the Appeal of Henry D. Weed, supra, which is entirely in accord with the decision of the Supreme Court in the American Hide and Leather Company case, we respectfully submit that this Honorable Court has entirely misapprehended the method of computation there prescribed. In that case the Board of Tax Appeals held that the tax should be computed under Section 226 but found the following fact:

"5. In his return for the five months' period ended May 31, 1918, the taxpayer reported five-twelfths of his net income for his fiscal period ended May 31, 1918."

If in the case at bar the same principle as outlined in the cases just cited is followed, the appellant is entitled to compute its taxes for the six months' period ended June 30, 1918, by taking six-twelfths of its net income for the entire fiscal year ended June 30, 1918, which amounts to only $247,695.20. (See Rec. p. 25.) In the very nature of the case the taxes for that period cannot possibly amount to "$302,524.66", less the abatement of $75,461.39, as the opinion of this court holds.

The appellants' erroneous original return was not put in evidence because the Commissioner rejected that return and issued his certificate of overassessment which the defendant admitted in open court to be valid (Rec. p. 16), which certificate is based upon the Commissioner's final determination of the appellant's net income for its entire fiscal year. However, it is possible upon this record properly to calculate the appellant's taxes for the six months' period ended June 30, 1918, in accordance with Section 226 of the Act, because its total income, deductions and credits for its entire fiscal year are shown in the Commissioner's letter of final determination dated May 7, 1923, Plaintiff's Exhibit 1, Rec. pp. 24-26. There is presented below the proper computations of the appellant's taxes for the six months' period ended June 30, 1918, both under Section 205 of the Act of 1918 and under Section 226 of that Act.

As a further indication that taxes paid on the basis of an erroneous return for only a portion of the entire year are to be readjusted, and allocated on the proper basis as required by the Statute, the attention of this Honorable Court is also invited to the comments in the Appeal of Paso Robles Mercantile Company, 12 B. T. A. 750, 754, which was affirmed by the Circuit — of Appeals for the Ninth Circuit and certiorari denied by the Supreme Court. In that case, the Board of Tax Appeals said:

"The statute makes no provision with respect to the method of crediting taxes paid on returns filed on one basis when they should be filed on another. The regulations of the Treasury Department are silent on the question. The

Commissioner for a period used one method and subsequently changed to another. There are no decisions on the question. We are then left to considerations of reason and general principles.

In our opinion, a tax erroneously determined on a calendar year basis should be credited on a tax shown due on a fiscal year basis in proportion to the months in the respective calendar years making up the fiscal year. By this method eleven-twelfths of the tax shown on the basis of the calendar year 1920, for instance, should be credited to the fiscal year 1921, since eleven-twelfths of the calendar year 1920 is in the fiscal year 1921.

It is true that the income for a year is determined on an annual basis, but the Supreme Court has found no difficulty in pro rating the earnings of the year in order to determine the amount thereof available for dividends at a particular period within the year. See Edwards v. Douglas, 269 U. S. 204; Mason v. Routzahn, 275 U. S. 175; 38 Sup. Ct. 50.

On the same principle we think the taxes might be pro rated over the year in order to allocate to the respective periods of any calendar year a proportionate part thereof applicable to those periods when the tax paid on a calendar year basis is to be credited on the tax liability on a fiscal year basis."

The appellant most respectfully requests that this Honorable Court will reconsider its holdings as to the method of computing taxes under Section 226 of the Act in the light of the "real holdings" of the Board of Tax Appeals in the case of the Appeal of Henry D. Weed, supra, and more especially in the light of the decision of the United States Supreme Court in the case of the American Hide and Leather Company, supra.

II

Under Section 205 of the Revenue Act of 1918, the computation of the taxes for a six months' period of the taxable year is accomplished by taking the gross income, deductions and credits for the entire year, calculating the tax on the net income thus obtained and dividing the tax by two instead of dividing the separate items by 2 as is prescribed

in the case of the computation under Section 226 of the Act.

The computation under Section 205 of the Act is so clearly stated in the Statute itself that it has not been the subject of controversy before the Board of Tax Appeals or in the courts as has been the case under Section 226. It is, therefore, unnecessary to cite cases prescribing the method of computation under Section 205. In the case at bar the record shows (pp. 24-26) that in the only statutory determination of the appellant's taxes for the six months' period ended June 30, 1918, which the Commissioner has ever made, the computation was made in accordance with Section 205 of the Act. The actual computation of the taxes appears at page 26 of the record.

III

As a matter of fact it is entirely immaterial whether the appellant's taxes for the six months' period ended June 30, 1918, be computed under Section 205 or under Section 226 of the Act of 1918. The only difference between the two computations is one of arithmetical method and not of results. In order that this point may be clearly revealed to this Honorable Court we present herewith the wording of the two sections themselves and the respective computations thereunder made in accordance with the methods which have been prescribed both by the United States Board of Tax Appeals and by the United States Supreme Court.

Section 205 (a) of the Revenue Act of 1918 provides as follows:

"Fiscal Year with Different Rates"

"Sec. 205 (a) That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the

portion of such period falling within the calendar year 1918 is of the entire period: * * *"

Section 226 of the Act of 1918 is as follows:

"Returns When Accounting Period Changed"

"Sec. 226. That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is from one fiscal year to another fiscal year a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year. If a taxpayer making his first return for income tax keeps his accounts on the basis of a fiscal year he shall make a separate return for the period between the beginning of the calendar year in which such fiscal year ends and the end of such fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; and the credits provided in subdivisions (c) and (d) of section 216 shall be reduced respectively to amounts which bear the same ratio to the full credits provided in such subdivisions as the number of months in such period bears to twelve months."

In the case at bar, as stated above, there is no dispute as to any of the items of income, deductions, credits or exemptions for the appellant's entire fiscal year ended June 30, 1918. All of these figures have been definitely determined and fixed by the Commissioner as shown in the Plaintiff's Exhibit "1," pages 24 to 26 of the record. These figures are as follows:

Net income as corrected (see Rec. p. 25)	$495,390.40
Invested capital for taxable year (see Rec. p. 25)	1,425,579.73

Total excess-profits credits (see Rec. p. 25)	117,054.38
Total war-profits credits (see Rec. p. 26)	164,088.78

Using these established figures, the correct computations of the plaintiff's taxes for the six months' period ended June 30, 1918, under the respective sections are as follows:

1. The correct computation under Section 205 of the Act, as made by the Commissioner and shown on page 26 of the record, is as follows:

"Computation of Taxes"

"Not over	Income	Deduction	Balance	Rate	Tax
20%	$285,135.95	$117,054.38	$168,081.57	30%	$50,424.47
Over 20%	210,254.45	.....	210,254.45	65%	136,665.39
	$495,390.40	$117,054.38	$378,336.02		$187,089.86

War-profits Tax

Net Income	$495,390.40		
Less Credit	164,088.78		
Balance taxable at 80%	$321,301.62	$265,041.30	
Less Excess profits tax		187,089.86	
			77,951.44
Total excess profits and war profits taxes			$265,041.30

Computation of Total Tax

Excess profits and war profits taxes			$265,041.30
Net income as corrected		$495,390.40	
Less:			
Interest on U. S. obligations.	$2,060.00		
Profits tax	265,041.30		
Exemption	2,000.00		
		269,101.30	
Taxable at 12%		$226,289.10	27,154.69
			$292,195.99
One-half, for six months period			$146,098.00
Previously assessed:			
(Original assessment, Account No. 402091)			$302,438.83
Tax Liability			146,098.00
Indicating an Overassessment of			$156,340.83"

2. The correct computation under Section 226 as prescribed by the cases cited above, which is not shown in the record, is as follows:

"Computation Under Section 226 of the Act"

"Net Income—6/12 of $495,390.40	$247,695.20
Invested Capital—6/12 of $1,425,579.73	$712,789.87

"Computation of Taxes"

"Not over	Income	Deduction	Balance	Rate	Tax
20%	$142,557.97	$58,523.19	$84,034.78	30%	$25,210.43
Over 20	105,137.23		105,137.23	65%	68,339.20
	$247,695.20	$58,523.19	$189,172.01		$93,549.63

War-profits Tax

Net Income	$247,695.20		
Less Credit	82,044.39		
Balance taxable at 80%	$165,650.81	$132,520.65	
Less Excess profits tax		93,549.63	
			38,971.02
Total excess profits and war profits taxes			$132,520.65

Computation of Total Tax

Excess profits and war profits taxes			$132,520.65
Net income		$247,695.20	
Less:			
Interest on U. S. obligations.	$1,030.00		
Profits tax	132,520.65		
Exemption	1,000.00		
		134,550.65	
Taxable at 12%		$113,144.55	13,577.35
			$146,098.00
(Original assessment, Account # 402,091)			$302,638.83
Tax Liability			146,098.00
Indicating an overassessment of			$156,340.38"

In holding that "determined under Section 226—there was, therefore, no overpayment" of the appellant's taxes for the six months' period ended June 30, 1918, this Honorable Court seems to have relied solely upon the misleading and confusing statements contained in the letter of December 17, 1929, Defendant's Exhibit "D," Rec. page 45, which states as follows:

"You are advised that the records of this office indicate that your return for the period ended June 30, 1918, disclosed a tax liability of $302,524.67. * * *

The proper method for computing the income for the six months' period in question is in accordance with the original

return which you filed (Appeal of Henry D. Weed, 2 B. T. A. 84, and Appeal of Coghlen Electric Company, 3 B. T. A. 1071) and Section 226 of the Revenue Act of 1918."

This Honorable Court has apparently disregarded all of the other evidence in the case which is in direct contradiction of the letter of December 17, 1929, to wit:

1. The Commissioner's letter of May 7, 1923, Rec. pp. 23-26.

2. The Certificate of Overassessment, Rec. p. 31.

3. The Schedule of Overassessments, Rec. p. 37.

4. The Schedule of Refunds and Credits, Rec. p. 37.

These documents show conclusively that there was an overpayment. It is perfectly obvious that if the letter of December 17, 1929 is right all of these documents are wrong. But the Government admitted, both in the District Court and before this Honorable Court, that the Certificate of Overassessment and the other documents were valid and sought to defeat recovery on various other grounds which did not involve the computation of the tax or the question of whether or not there had been an actual overpayment of the appellant's taxes.

The letter of December 17, 1929, says that "the return for the period ended June 30, 1918, disclosed a tax liability of $302,524.67", but the return itself showing the figures upon which that tax liability is determined is not in evidence. The fact is that the Commissioner properly rejected that return in May, 1923, because it did not then, any more than it did on December 17, 1929, conform to the requirements of the statute.

The letter also says that "the proper method of computing the income for the six months' period in question is in accordance with Section 226 of the Revenue Act of 1918", but there is no evidence in the record to show the actual computation of the tax "in accordance with Section 226 of the Act", such as is presented above.

Furthermore the holdings of this Honorable Court seem to amount to a "finding of fact" which is contrary to the whole theory upon which the District Court decided the case. That court did not find that there had been no overpayment of the taxes for 1918. Its decision is predicated

upon the fact that there was such an overpayment actually credited to the outlawed taxes for 1915, 1916 and 1917.

Regardless of all of the uncertainties both of law and of fact and the unsatisfactory manner in which this case was tried, the record shows beyond dispute that the appellant's total income for the entire fiscal year was only $495,390.40. (See Rec. p. 25.) One-half of this amount, which is $247,695.20, is all that is properly attributable to the six months' period.

Aside from all other questions involved in the case, the appellant respectfully submits that this Honorable Court should reconsider its comments in regard to the method of computation of the taxes under Section 226 of the Act not only because the opinion will be widely quoted and referred to by other taxpayers, courts and attorneys, where that question arises, but also because the holdings of this Honorable Court in that regard are directly in conflict with the applicable decisions of the Board of Tax Appeals.

It is obviously inconceivable that there can be a tax of $302,524.67 on a net income of only $247,695.20, as the letter of December 17, 1929 states. Nor can the taxes on a statutory income of only $247,695.20 be "$302,524.65, less the abatement $75,461.39", or $227,063.26, as the opinion of this Honorable Court holds in the comments quoted above.

Wherefore the appellant earnestly prays that its within motion may be allowed to the end that at least this error on the part of this Honorable Court may be reconsidered and corrected before the opinion becomes final.

By O. Walker Taylor, Attorney for Appellant.

Thereafter, to wit, on October 11, 1932, the opinion of the court on motion for reconsideration, etc. (page 77) was filed, and the following Order of Court was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING MOTION FOR LEAVE TO ARGUE ORALLY, ETC.—October 11, 1932

It is ordered that the motion for leave to argue orally on the question of the proper method of computing taxes be, and the same hereby is, denied.

By the Court.

Arthur I. Charron, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1932

No. —

ARTHUR C. HARVEY COMPANY, Petitioner,

vs.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS, Former Collectors, Respondents

ORDER EXTENDING TIME WITHIN WHICH PETITIONER MAY APPLY FOR WRIT OF CERTIORARI

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is now here ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby extended for a period of thirty days from November 4, 1932.

Harlan F. Stone, Associate Justice of the Supreme Court of the United States.

October 24, 1932.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,234. U. S. Circuit Court of Appeals, First Circuit. Term No. 537. Arthur C. Harvey Company, petitioner, vs. John F. Malley and/or Malcolm E. Nichols, former collectors. Petition for a writ of certiorari and exhibit thereto. Filed December 3, 1932. File No. 37,234.